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In the Supreme Court of the United States

OCTOBER TERM, 1965

RECORD NOT PRINTED

No. 4901

SAMUEL H. SHEPPARD,
PETITIONER,

v.

E. L. MAXWELL, WARDEN,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Samuel H. Sheppard, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on May 5, 1965.

Citations to Opinions Below

The opinion of the Court of Appeals for the Sixth Circuit is reported at 33 LW 2588, and is reproduced in the appendix to this petition at page Rs. 1. The opinion of the Court of Appeals for the Sixth Circuit denying rehearing

is unreported as yet, and is reproduced in the appendix at page Rs. 112. The opinion and order of the District Court is reported at 231 F. Supp. 37, and is reproduced in respondent's record-appendix[1] in the Court of Appeals at page Ra 393a.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on May 5, 1965. Rs. 3. Rehearing was denied on July 12, 1965. Rs. 111. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Did the pre-trial publicity in petitioner's case so prejudice the community that no fair and impartial jury could have been impanelled?

2. Did the trial judge fail to adequately protect the petit-jury, once impanelled, from prejudicial extrinsic influence?

3. Did the trial judge fail to adequately interrogate the jurors when they had been exposed to prejudicial extrinsic matter through the news media during trial?

4. Did the trial judge fail to maintain constitutionally adequate decorum in the courtroom during trial?

5. Did the trial judge deny petitioner a public trial by assigning nearly all of the seats in the courtroom to newsmen?

6. Did the trial judge, in the special circumstances of this case, violate petitioner's constitutional right to a fair and impartial judge by failing to recuse himself despite

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[1] For convenience of reference, page numbers in the appendix to the petition will be preceded with "Rs"; page numbers in the respondent's record-appendix in the Court of Appeals will be preceded by "Ra"; and page numbers of the original transcript trial testimony will be preceded by "Tr".

his firm belief, undisclosed to petitioner, that petitioner was "guilty as hell" and that the case against him was "open and shut"?

7. Did the trial judge violate petitioner's federal constitutional right against self-incrimination by receiving evidence that petitioner had refused to take a lie detector test and truth serum?

8. Did the action of the bailiffs who permitted jurors to telephone outsiders during the course of deliberations in violation of Ohio law violate petitioner's federal constitutional right to a fair and impartial trial?

9. Did the court below deprive petitioner of proper review of other claimed federal constitutional violations?

10. Did the court below improperly foreclose without litigation the question of the sufficiency of the evidence?

11. Did the court below erroneously rule that no combination of individual errors, none of which rises to the stature of a federal constitutional violation, can in the aggregate show that the state court trial fell short of the requirements of due process of law?

Constitutional Provisions and Statutes Involved

Constitution of the United States

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment

of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Statutes

Section 2505.21, Ohio Revised Code. *Hearing on Appeal.*

"Appeals taken on questions of law shall be heard upon assignment of error filed in the cause or set out in the

briefs of the appellant before hearing. Errors not argued by brief may be disregarded, but the court may consider and decide errors which are not assigned or specified. Failure to file such briefs and assignments of error within the time prescribed by the court rules is cause for dismissal of such appeal. All errors assigned shall be passed upon by the court, and in every case where a judgment or order is reversed and remanded for a new trial or hearing, in its mandate to the court below, the reviewing court shall state the errors found in the record upon which the judgment of reversal is founded. * * * "

SECTION 2945.21, OHIO REVISED CODE. *Peremptory challenges in capital cases.*

"On the impaneling of a jury in a capital case, the state and the defendant, if there is only one defendant, may each peremptorily challenge six of the jurors, which challenges shall be exercised alternately. If there is more than one defendant, each defendant may peremptorily challenge six of the jurors, and the state may peremptorily challenge a number equal to the combined number allowed to all the defendants. Neither the state nor a defendant may be deprived of any of the challenges by reason of such order of exercising the same, or the time or manner of exercising the same."

SECTION 2945.29, OHIO REVISED CODE. *Jurors becoming unable to perform duties.*

"If, before the conclusion of the trial, a juror becomes sick, or for other reason is unable to perform his duty, the court may order him to be discharged. In that case, if alternate jurors have been selected, one of them shall be designated to take the place of the juror so discharged. If, after all alternate jurors have been made regular jurors, a juror becomes too incapacitated to perform his duty, and

has been discharged by the court, a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or thereafter impaneled."

SECTION 2945.32, OHIO REVISED CODE. *Oath to officers if jury sequestered.*

"When an order has been entered by the court of common pleas in any criminal cause, directing the jurors to be kept in charge of the officers of the court, the following oath shall be administered by the clerk of the court of common pleas to said officers: 'You do solemnly swear that you will, to the best of your ability, keep the persons sworn as jurors on this trial, from separating from each other; that you will not suffer any communications to be made to them, or any of them, orally or otherwise; that you will not communicate with them, or any of them, orally or otherwise, except by the order of this court, or to ask them if they have agreed on their verdict, until they shall be discharged, and that you will not, before they render their verdict communicate to any person the state of their deliberations or the verdict they have agreed upon, so help you God.' Any officer having taken such oath who willfully violates the same, or permits the same to be violated, is guilty of perjury and shall be imprisoned not less than one nor more than ten years."

SECTION 2945.33, OHIO REVISED CODE. *Keeping and conduct of jury after case submitted.*

"When a cause is finally submitted the jurors must be kept together in a convenient place under the charge of an officer until they agree upon a verdict, or are discharged by the court. The court may permit the jurors to separate during the adjournment of court overnight, under proper cautions, or under supervision of an officer. Such officer shall not permit a communication to be made to them, nor

make any himself except to ask if they have agreed upon a verdict, unless he does so by order of the court. Such officer shall not communicate to any person, before the verdict is delivered, any matter in relation to their deliberation. Upon the trial of any prosecution for misdemeanor, the court may permit the jury to separate during their deliberation, or upon adjournment of the court overnight."

Statement of the Case

Your petitioner, Samuel H. Sheppard, filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio on April 11, 1963. He alleged that he was being restrained of his liberty in violation of his federal constitutional rights by the respondent, E. L. Maxwell, who was and is the Warden of the Ohio State Penitentiary at Columbus. Such restraint was caused by a judgment of conviction for murder in the second degree in the Court of Common Pleas in Cuyahoga County, Ohio, on December 21, 1954; this judgment had been affirmed by the Court of Appeals of Cuyahoga County and the Supreme Court of Ohio, 165 O.S. 293. (The opinions of the Ohio Courts are reproduced in record-appendix Ra, pp. 49a and 109a). This Court denied a petition for a writ of certiorari to the Ohio Supreme Court, *Sheppard* v. *Ohio*, 352 U.S. 910.

The allegations of the petition were reduced to twenty-three stipulated issues. As to nine of these, stipulations of fact were submitted by counsel and accepted by the District Judge. Four of the remaining issues were consolidated with other issues, and upon these evidence was received. One issue, No. 19 (Ra 150a(2)), relating to the sufficiency of the evidence at trial, was not considered by the District Court.

Each side submitted various briefs dealing with all of

the issues except the sufficiency of the evidence, and on July 15, 1964, the District Judge entered an order voiding the state court conviction and admitting the petitioner to bail pending possible retrial. Respondent filed a notice of appeal and moved to stay the order allowing bail; on July 23, 1964, the Sixth Circuit Court of Appeals denied the motion.

On October 9, 1964, the appeal was argued before a three-judge panel of the Sixth Circuit Court of Appeals; on May 5, 1965, that Court entered an order reversing the judgment of the District Court and remanding petitioner to the custody of respondent, one Judge dissenting. On June 14, 1965, a petition for rehearing and rehearing en banc was filed; both were denied on July 12, 1965, the same Judge dissenting as to each. On July 26, 1965, petitioner's motion to stay the mandate pending application for certiorari was granted.

Statement of Facts

At some time during the early morning hours of July 4, 1954, petitioner's wife was beaten to death in her bed by some weapon which has never been ascertained or located.[2] She was last seen alive at about midnight by certain guests named Ahern who departed the Sheppard home on the shore of Lake Erie in Bay Village, Ohio, while the victim bade them goodnite at the door. Petitioner was at the time asleep on a couch in the living room. Petitioner was and is an osteopathic neurosurgeon, and on the evening in question was exhausted from emergency surgery.

Shortly before six o'clock in the morning, J. Spencer Houk, Mayor of Bay Village who lived two doors distant from petitioner, received a call on the telephone. He heard

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[2] The facts contained in this statement are taken from the stipulated history of the case. Ra 31a.

petitioner say weakly: "Spen! Come quick! I think they've killed Marilyn!"

Houk arose and dressed, as did his wife Esther. They got their automobile and drove the few yards to petitioner's home. Upon entering they found petitioner slumped in a chair in the den on the first floor. His trousers were wet and he seemed groggy and in pain. Marilyn Sheppard was found lying in her bed in a pool of blood. The entire room was spattered with blood. It was later opined by the coroner and others that she had been struck thirty-five times on the head with some blunt instrument. Her skull was fractured in many places but not crushed. Examination of the first floor of the house disclosed abundant evidence of ransacking.

Petitioner related to the Mayor his recollection as to what had happened. It is a narrative which has never varied to this day.

Dr. Sheppard stated that he had been awakened at some point during the night by the sound of his wife screaming. He rushed up the stairs from the couch where he had been sleeping, and as he entered the bedroom he saw a form standing next to the bed. He was unable to distinguish whether he was looking at a man or a woman, and did not know how many people were in the room. Suddenly he was struck from behind at the base of his skull and rendered unconscious. He came to at some undetermined later time, and heard noise on the first floor. He ran downstairs and chased what appeared to be a male person through the screen door at the back of the house and down to the shore of Lake Erie. There he grappled with his unknown assailant; he was caught in a strangle hold of some sort and was a second time rendered unconscious, again for an undetermined period. He awoke with the lower half of his body in the water, made his way back to the house, and called Houk.

In corroboration of his story, Dr. Sheppard exhibited severe facial injuries and a fractured cervical vertebra. There was sand in his pockets and cuffs. There was one diluted blood-spot on the knee of his trousers where he had knelt next to his wife to take her pulse after returning from the lake. And following the trial, when police returned custody of the house to the defense, a criminologist named Dr. Paul Leland Kirk found blood in the murder room which did not come from Dr. Sheppard or his wife.

On the morning of the murder, investigations were commenced by the Bay Village Police Department, the Cleveland Police Homicide Unit, the County Sheriff, the County Prosecutor and the County Coroner. No suspects of consequence were ever isolated. Dr. Sheppard was interrogated at the hospital to which he had been removed by numerous law enforcement officials. One of these accused him of the murder, which he flatly denied. He was asked to submit to a lie detector test, which he at first refused because of his physical condition and later on advice of counsel. He similarly refused police demands that he submit to truth serum.

The initial publicity concerning the crime was substantial. A concerned community pressed for solution of the crime. There was talk by the coroner of an inquest, but none was called. After a few days the attention given to the case by the news media began to taper off.

At this juncture the editor of the Cleveland Press, a leading newspaper in the Cleveland area, suspected that petitioner was being sheltered because of his affluence or social position.[3] To prevent this "shelter", and to fore-

[3] The role of this editor in guiding the Sheppard case toward what he thought to be a proper result need not be surmised or inferred, for he has set to print what he did and what his reasons were. *Seltzer*, "The Years Were Good", World Publishing Company, 1956. The chapter of this autobiography specifically relevant to the Sheppard case is reproduced in our appendix. Rs. 180.

stall any loss of public interest in the case, the Press instituted a series of banner-headed front-page editorials. These called for the "grilling" of petitioner by "third-degree" methods, castigated him for refusing the alleged exculpatory tests, and criticized law enforcement generally for failing to bear down on Dr. Sheppard.

The campaign was eminently successful. Public interest did not diminish or die, but was whetted to near-frenzied proportions. Although no additional significant evidence developed after the first day of investigation, editorial demands by the Press that (1) Bay Village authorities yield charge of the affair to the Cleveland Police, (2) the coroner call a public inquest, and (3) that Sam Sheppard be arrested were followed with swift compliance by elected officials. On July 30, 1954, twenty-six days after the murder, petitioner was arrested on a charge of murder in the first degree. He was thereafter indicted and on October 23, 1954, was put to trial before Judge Edward Blythin of the Common Pleas Criminal Court and a jury. The jury began its deliberations on December 17, 1954, and on December 21, after nearly five full days, found petitioner not guilty of murder in the first degree but guilty of murder in the second degree.[4] He was sentenced to life imprisonment.

During the trial the jurors were permitted to go to their homes each night. The news coverage of the affair was massive, and much alleged evidence was announced and summarized by the prosecution prior to its offer in court.

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[4] The verdict of second degree murder is significant, for as Judge Edwards has pointed out in his dissent, the only case presented to the jury involved premeditation; the only motive suggested to the jury was petitioner's affection for one Susan Hayes, with whom he had philandered some months earlier. The jury's rejection of this latter element presents a very large question as to just what facts they found to support unpremeditated murder.

A good deal of what was described as damning evidence was never produced.[5]

Judge Edward Blythin, who assigned the case to himself, remarked to a court clerk prior to petitioner's indictment that petitioner was as guilty as he (Judge Blythin) was innocent of the murder of Marilyn Sheppard. While the jury was being impanelled, Judge Blythin visited in his lobby with Dorothy Kilgallen Kelmar, a nationally syndicated columnist. He remarked to her that petitioner was "guilty as hell" and that the case was "open and shut". He did not disclose these views to defense counsel, or recuse himself because of them.[6]

Prior to trial Judge Blythin caused to be erected inside the bar special benches. These, together with all save one of the regular benches, he assigned by name to various newsmen. Every major news service was represented at the trial. One bench was reserved for the families of the defendant and the victim. Others could gain admission to the courtroom only by exhibiting a special pass signed by Judge Blythin.

The newsmen constantly disrupted the proceedings, moving in and out of the courtroom at frequent intervals to shift off with teammates and making noise generally. Photographs and television pictures were taken constantly at each minute that the trial was not in actual progress. Petitioner was repeatedly photographed in the courtroom without his consent, and was depicted daily in the news. Frequent requests by counsel and occasional admonitions by the court did not maintain a peaceful and serene decorum.

Two policemen testified that petitioner had refused on several occasions to submit to a lie-detector test. When re-

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[5] See for instance the outrageous story in the Cleveland Press announcing expected testimony that petitioner was in fact a "Jekyll-Hyde". Rs. 109.

[6] These facts were found by the District Judge. Ra 458a.

quested to instruct the jury that such fact was of no consequence, the trial judge stated that no person had a legal obligation to submit to the test; he did not state that a refusal was of no probative weight.

Throughout the trial the news was peppered with anecdotes extraneous to the record. Robert Considine stated over WHK radio that petitioner's denial of guilt reminded him of the denials of Alger Hiss when Hiss was convicted of perjury. The trial judge refused to ask the jurors if they had heard this remark. Walter Winchell announced that a girl in New York then under arrest for armed robbery revealed that petitioner was the father of her illegitimate child. The trial judge asked the jurors in a body if they had heard the story, and two said that they had but would not be influenced by it. The Cleveland Press bannerheaded the fact that a "bombshell" witness would soon testify that Marilyn Sheppard had once privately described petitioner as a "Jekyll-Hyde". No witness so testified, and the jury was not interrogated as to this disclosure.

The trial judge, over objection, permitted Mrs. Dorothy Ahern to testify that she had been told by Marilyn that Marilyn had been told by a Dr. Chapman that Dr. Chapman had been told by petitioner that petitioner was considering divorce.[7]

Motions for continuance and change of venue were presented before and repeatedly during the trial, and all were denied.

The judgment of conviction has been under litigation constantly during the past eleven years.

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[7] Cf. dissenting opinion of Ohio Supreme Court judges Taft and Hart. Ra 121a.

Reasons for Granting the Writ

Petitioner respectfully suggests that there are several different reasons for granting a writ of certiorari to the Court of Appeals. First and foremost is the fact that this trial was, as the District Judge remarked, a "mockery of justice", and ought not to be allowed to permanently stain the record of American jurisprudence. Second, there are numerous individual violations of the federal constitution which cannot now be vindicated without action by this Court. Third, the reviewing process in the Court of Appeals fell far short of that required by current habeas corpus decisions of this Court; and finally, the conduct of prosecuting officials and newsmen which the Court of Appeals now condones was so flagrant and abusive that the stamp of approval they now enjoy should be eradicated.

We will deal first with those questions confronted by the District Court and the Court of Appeals; second with those alleged constitutional violations noted but not considered by the District Judge and summarily rejected by the Court of Appeals; and third with the failure of review described above.

I. The Publicity and Control of the Courtroom and Jury

Among the exhibits certified to this Court by the Court of Appeals are five bound scrapbooks, green in color. The parties stipulated in the District Court that these scrapbooks contain all of the newsclippings in the Cleveland area from the day of the murder until the rendition of the judgment of conviction.[8] Several of the most objectionable headlines and editorials have been reproduced as foldouts in the appendix to this petition. Also in the appendix is trial counsel's affidavit describing the circumstances in the court-

[8] See Ra 297a.

room during the trial. All of the opinions of the Ohio Courts, and the opinion of the District Judge who freed petitioner, are contained in respondent-appellee's record-appendix in the Court of Appeals. Nine copies of this three-volume record-appendix have been transmitted to this Court for examination in connection with this petition. The record-appendix further contains a history of the case, stipulated facts bearing on some issues, extracts from the trial transcript relating to other issues, and statements of the witness who had conversation with Judge Blythin.

A. *The Pretrial Publicity:*

Judge Weinman, in his opinion, has set forth in some detail the text of certain of the "news" stories which appeared in Cleveland between the date of the murder and the commencement of the trial. It was these stories which led him to apply the principle of *Rideau* v. *Louisiana*, 373 U.S. 723, to the present case and rule that no fair and impartial jury could have been impanelled in Cuyahoga County in October, 1954. These excerpts, however, are but a very small part of what was written about Sam Sheppard during the months in question. The sheer volume of material which was heaped upon the citizenry can only be ascertained from the aforementioned scrapbooks.

While it is certainly true that the law cannot promise or indeed furnish jurors who have read and heard nothing about the case to be tried, this Court has in several instances been confronted with situations where it was necessary to conclude that the jury had been tainted by exposure to news releases. *Irvin* v. *Dowd*, 366 U.S. 717; *Rideau* v. *Louisiana*, 373 U.S. 723; *Janko* v. *United States*, 366 U.S. 716, *Marshall* v. *United States*, 360 U.S. 310. Petitioner contends that circumstances here warrant the same result.

Collisions between the right of a free press and the right

to a fair trial do present, as the District Judge has noted, problems most difficult of resolution. To preserve prospective jurors in a wholesome and impartial condition while allowing full run to the public's "right to know" doubtless requires some treading upon a legal tightrope. But there is in this case one element which the decisions above-cited lack; publicity which did not flow from the natural stream of news activity, but which was deliberately and maliciously contrived and disseminated in a manner *calculated* to prejudge a criminal case. It is this aspect of the Sheppard case which the Court of Appeals refused to confront despite the fact that the opinion of the District Court found it to be of prime significance.

Because of its constitutionally-guaranteed freedom, a newspaper wields great power. Aspiring politicians as well as those holding office can be destroyed by an irate press. It is therefore of considerable importance to note that all of the persons whose official action is claimed by petitioner to have wrongly produced his conviction were elective, and that some—including the prosecutor and the judge—were facing an imminent election as the trial began.[9]

Mr. Seltzer, the editor who decided to "move" the Sheppard case, has made no bones about his intentions, his methods, or the results he produced. His agent, a reporter named Forrest Allen, correctly stated over WHK radio in Cleveland on the day the trial began, "I think the Press handling of the Sheppard story produced the trial that we have got going on over there today because I don't think the officials were going to do anything about it." Of significance is the fact that the Press continued to use its might to produce a conviction— a conviction which by that time it badly needed to stave off subsequent libel suits—by reporting un-

[9] Prosecutor Mahon was successful in winning election to the Common Pleas bench. Judge Blythin won re-election by a landslide. Dissenting opinion of Judge Edwards, appendix B, Rs 101.

true, inadmissible and prejudicial information throughout the trial.

We think it highly doubtful that any citizen can enjoy a fair trial in a community permeated by a large newspaper which has as its purpose prosecution and conviction. Judge Weinman noted that:

> "If ever there was a trial by newspaper this was a perfect example. And the most insidious violator was the Cleveland Press. For some reason that paper took upon itself the role of accuser, judge and jury. The journalistic value of its front page editorials, the screaming, slanted headlines and the nonobjective reporting was nil, but they were calculated to inflame and prejudice the public." Ra 453a

Sam Sheppard was not arrested because officials had or came upon some piece of evidence tending to show that he had killed his wife. He was arrested because editor Seltzer wrote an editorial of the front page of his newspaper which was bannered "WHY ISN'T SAM SHEPPARD IN JAIL" and thereafter changed the banner to "QUIT STALLING — BRING HIM IN". The fact that arrest followed hard on the heels of this editorial rather than upon the discovery of some new facts is ample proof that the processes of the law had crumpled before the power of a man who cared little for the rights of an American citizen. It is this shocking conduct which the majority in the court below have chosen to enshrine with the condonation of the law—a condonation which ought to be sharply stricken down.

Beyond the vicious attacks of the Cleveland Press and the shabby but less virulent me-tooism of the other Cleveland newspapers, there was one significant event which

further aggravated the hostile undercurrent against which petitioner vainly tried to swim. County Coroner Samuel Gerber, immediately upon the demand of the Press (see appendix Rs 117, 118 (called an inquest. Although such proceedings were customarily held in the county morgue, Coroner Gerber staged the Sheppard inquest in the gymnasium of the Normandy School in Bay Village. He explained at trial that he took this unusual step because he wanted to have an audience (Tr. 3453) and desired to "satisfy" the people (Tr. 3452).

We submit a description of these proceedings as we believe them to be relevant to the issue of pre-trial prejudice in the community. A pre-trial proceeding may well cause disruption which affects the constitutionality of the trial itself. *Estes* v. *Texas*, U.S. , 85 S. Ct. 1628.

The inquest was attended by the county prosecutor, who acted as advisor to the coroner, and two detectives, who acted as bailiffs. The petitioner was subpoenaed, as were members of his family. The gymnasium where the inquest was held seated several hundred people, and was crowded to capacity. Across the front of the room was a long table occupied by reporters, television and radio personnel, and broadcasting equipment was set up in the room. Two live microphones were placed, one in front of Coroner Gerber and one in front of the witness stand, so that all which was said by the coroner or the witness was broadcast. A squadron of newsmen was present, and photographs were constantly being taken.

When petitioner and his brother, Dr. Stephen Sheppard, entered the room they were searched in full view of the audience.

Petitioner's counsel were present at the outset but were ordered not to in any way participate by the Coroner. When counsel objected to some part of the proceedings he

was forcibly ejected from the room. Delighted ladies ran up to Coroner Gerber and hugged and kissed him for this splendid move.[10] The inquest commenced on July 22 and ran for three full days. At its conclusion Gerber announced for the news media, "I could order Dr. Samuel H. Sheppard held for action by the grand jury." Why he did not take such a step was unexplained; but having in mind that Dr. Gerber was and is a member of the bar, perhaps he was troubled by a lack of probable cause.

The District Court has adequately set forth enough of the publicity before trial to warrant a conclusion that the Cleveland community was in no condition to furnish a jury sufficiently impartial to reach minimium standards of due process. Additional material contained in the green scrapbooks reinforces this position very soundly. We submit that the Court of Appeals was in error in rejecting as clearly erroneous the District Judge's finding of fact, and that examination of the matter by this Court warrants granting the writ.

B. *Publicity During Trial:*

Defense counsel sought vehemently to postpone the trial until what it felt was public prejudice could subside, and to change the venue to some other county not saturated with the invidious art of the Cleveland Press. The trial judge denied these motions. Although the fact is relevant to a subsequent issue, we are constrained to point out that the trial judge was a candidate for re-election to this post in November, 1954. He was the subject of laudatory articles by the Cleveland Press, which on October 9, 1954, published the following:

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[10] See the opinion of the District Court, Ra 443a.

"JUDGE BLYTHIN AT 70 HAS INSPIRING CAREER"

"Judge Edward Blythin will be 70 tomorrow. The Press wants to be the first to congratulate him and does so now, even if it means jumping the gun.

The milestone is important. It calls for hearty wellwishes. The career can't be emphasized too often either. It is the answer to those who try to make you believe the doors of opportunity are now closed.

The Blythin rise to high office is a heartening story of a young Welch bookkeeper who came to America to visit a brother, who decided to stay and who in time became the Mayor of the big city of his adoption. It is a story of ambition, of struggle, of determination, of triumphs.

Judge Blythin is a forthright man, a plain man and a hardworking man. One almost hesitates to say he has a sense of humor. So many men credited with that happy faculty really lack it. Judge Blythin has the rare quality. It has sustained him in many difficult situations.

One can go on in length about the man and his career. The birthday, though, is the affair now at hand, or nearly so.

Happy Birthday, Judge Blythin. And may you enjoy many more happy, fruitful years."[11]

The reason that the Press "jumped the gun" in issuing these warm felicitations is made clear by another matter which it printed the same day. The Press had learned that defense counsel, in order to prove that a change of venue was necessary, had begun a move in the nature of a Gallup poll to demonstrate the widespread public belief that petitioner was guilty.

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[11] This editorial and the one set forth below are contained in the newsclips in the scrapbooks.

"NON-LEGAL NONSENSE"

"Whatever the motive of the mass-survey of opinion on the guilt or innocence of Dr. Sam Sheppard, the technique is wrong, and dangerous.

The surveyors are asking for an off-the-cuff verdict from people who have not heard the evidence.

The 'findings' of this survey will be based solely upon hearsay, upon personal and uninformed opinions.

And yet the result will, unquestionably, be introduced into the trial, presumably in an effort to move the trial to some other city.

The whole scheme is non-judicial, non-legal nonsense.

It smacks of mass jury-tampering.

Defense Attorney William Corrigan should know that, and call the whole thing off immediately.

And the Bar Associations, which are always so sensitive to any outside effort to interefere with the Courts, should come forward to resist this effort, too."

Thus in none too subtle fashion, the Press informed Judge Blythin that it was opposed to any changes of venue. Since the judge never articulated his reasons for denying such relief, we think it impossible to say that he was not influenced by the conduct of this newspaper.

If there had to be a trial in Cleveland, the judge had a duty *sua sponte* to sequester the jurors once they were picked. He well knew that the trial was going to become a newsman's holocaust, for he had spent some time making the unusual arrangements to accommodate reporters and exclude the public.[12] The Court of Appeals was of the

[12] Judge Blythin also knew that the jurors were reading the newspapers. Juror Barrish explained on voir dire that he had been reading

view that this duty did not exist unless some motion for sequestration had been made by the defense. Rs 9. We think this a most unfair position to take. Defense counsel had sought the proper remedy, and it had been denied them. They were not bound to seek alternative remedies which might later be held to have watered down such appellate rights as had accrued through denial of a change of venue. If Judge Blythin sincerely felt that twelve people could be found who would be impartial at the outset, he should have used his full powers to preserve what impartiality there was.

As Judge Edwards has pointed out in his dissent, failing to lock up the jury was only one of the ways in which the trial judge fell short in his obligation to preserve its freedom from taint. He did not *order* the jurors to refrain from exposing themselves to news accounts of the trial or the case in general; he did not interrogate the jurors when it was brought to his attention that outrageous false stories and opinions were being broadcast by nationally prominent newsmen. And he did not declare a mistrial when it became apparent that the news media were conducting their own trial of petitioner quite apart from any court control. When approached by counsel about these extrinsic influences, he repeatedly threw up his hands and disclaimed any power to remedy the situation.

For his failure to take these steps in at least an attempt to secure to petitioner an impartial jury, it must be said that Judge Blythin's handling of the trial did not comport with what our constitution means by "fair trial". This proceeding was more in the nature of a sham and a circus,

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all about the Sheppard case every day since his name had been published in all three Cleveland papers as a prospective juror, and that he had been "following it up because if I was chosen I'd know something about the case". Tr. 62.

used to transmute into a legal judgment the dictates of a greedy and glutted press.

Also pertinent to a determination as to whether this trial is constitutionally defective is the courtroom atmosphere which prevailed. This is especially true in view of the recently announced principles of *Estes* v. *Texas*, U.S. , 85 S. Ct. 1628. For although various Justices of the Court have differed in approach, we read the *Estes* case as establishing beyond question that substantial disruption and distraction in a courtroom is constitutionally impermissible. And while the Sheppard trial did not have live television in open court, the record discloses distractive influences beside which the *Estes* trial was the picture of serenity.

The District Court in voiding petitioner's conviction noted and disapproved of the unusual arrangements made by the trial judge to accommodate the news media:

> "It is one thing to accommodate the news media; it is quite different when a major portion of the courtroom is reserved for it. Here a comparatively small courtroom was reserved primarily for the news media and the trial was its showpiece. The Supreme Court of Ohio characterized the atmosphere surrounding the trial as "a Roman holiday for the news media". Under such circumstances, the requisite atmosphere for a fair trial could not, and in fact did not, exist." Ra 451a.

Judge Edwards, dissenting in the Court of Appeals, noted in some detail the objectionable courtroom setting. Rs 59. And ample description thereof is furnished by trial counsel's affidavit in support of his motion for new trial. Rs 158.

In addition to the confusion and distraction which must

result whenever a trial is given over entirely to newsmen, we think as fatal error there can be no worse constitutional violation than the continual spotlighting of the jury—in this case with the approval and cooperation of the trial court.

> "And special note must be given the attempt of the newspapers to influence the jury. It was startling to find photographs of the entire jury and of individual jurors (at times giving their home addresses) in no less than 40 issues of the Cleveland newspapers. The Court need not be naive, and it does not stretch its imagination to recognize that one of the purposes of photographing the jurors so often was to be assured that they would look for their photographs in the newspapers and thereby expose themselves to the prejudicial reporting." Ra 452a.

This observation by Judge Weinman is especially pertinent to what Mr. Justice CLARK has said in *Estes* v. *Texas,* U.S. , 85 S. Ct. 1628, 1634; speaking about jury exposure to the community through the medium of television, which is different in *kind* from the instant case but certainly not in degree:

> "The conscious or unconscious effect that this may have on the juror's judgment cannot be evaluated, but experience indicates that it is not only possible but highly probable that it will have a direct bearing on his vote as to guilt or innocence. Where pretrial publicity of all kinds has created intense public feeling which is aggravated by the telecasting or picturing of the trial the televised jurors cannot help but feel the pressures of knowing that their friends and neighbors have their eyes upon them. If the community be

hostile to an accused, a televised juror, realizing that he must return to neighbors who saw the trial themselves, may well be led 'not to hold the balance nice, clear and true between the State and the accused***'."

In comparing the Estes circumstances with the case at bar, we feel that the following points are germane:

(1) The Estes jury was sequestered. Thus they did not see the publicity during trial, were unaware as to what public and press sentiment was, and were not exposed to sidewalk opinions which might have led them to understand that an acquittal would have been most unpopular. The Sheppard jury did not have this protection.

(2) If the Estes jury feared that its result would be second guessed by a public which had observed the evidence firsthand, at least that jury enjoyed the comfort of knowing that what the public viewed was actual evidence. But the Sheppard jury knew that the public was largely unaware of all of the *evidence*, since it learned only those sensational portions which newsmen saw fit to excise from the proceedings. The Sheppard jury must have been aware that the case against petitioner as reported by the press was far more grave than the case disclosed by the actual evidence, and thus must have felt pressure to make its verdict conform to that which the public would have been seduced to expect.

(3) Even though the Sheppard jury was not subjected to live television in the courtroom, the publicity which each juror was afforded was sufficient to produce exactly the situation which live television would have produced. Because of constant photographing and listing of names and addresses of individual jurors,

each juror must have felt that he or she was going to be held publicly accountable for his or her vote by stranger and acquaintance alike.

Both the District Judge and the dissenting judge in the Court of Appeals have pointed up numerous specific violations of petitioner's right to have his jury insulated from extrinsic influence, and to have the effect of such influence carefully investigated once exposure to prejudicial material has been shown. We do not repeat those instances here, but we respectfully suggest that they show beyond question that the trial court's handling of the entire matter was woefully inadequate, and operated to deprive petitioner of a fair trial.

II. The Impartiality of the Trial Judge

The District Judge found as a fact that the state judge who presided over petitioner's trial had said in July, 1954 (before there was an indictment), "Sam Sheppard is as guilty as I am innocent"; and that he said in October, 1954, "This is an open and shut case—he is as guilty as hell!" The District Judge ruled that such expressions of prejudgement by one entrusted with the supervision of a capital case removed the presumption of impartiality to which all judges are entitled, and that the failure of Judge Blythin to recuse himself under the circumstances violated Dr. Sheppard's federal constitutional right to a fair and impartial trial.

To this view the majority of the Court of Appeals took exception. After reviewing numerous authorities wherein it is declared as a matter of black-letter law that statements adverse to deceased persons are to be regarded with suspicion, and then accepting as fact the findings of the District Judge, the Court of Appeals held that such decla-

rations raised no presumptions as to impartiality and destroyed none. After reciting several of the trial judge's self-serving declarations which proclaimed his absolute impartiality in the case, the Court of Appeals concluded that whatever he may have said prior to trial was insufficient to justify a presumption that the presumption of impartiality was removed. This ruling was, we contend, erroneous.

For his defense of Judge Blythin and the judiciary generally the author of the majority opinion in the Court of Appeals is to be commended. Indeed, what he has said is correct in principle, we hasten to agree. If those whose lot requires that they bestride the bench in cases of white-hot controversy were not protected from frivolous attack and careless slander, it is doubtful that the judiciary of this nation would command the Bar's top echelon if every judge whose lot it was to make close judgment were immediately opened up to impeachment because one party or the other was discontent with the result. And no matter how great the reluctance to venture an attack upon one whose burden it is to preside at the trial of a difficult lawsuit, certainly that displeasure increases tenfold when such a move must be made posthumously.

There is, nonetheless, the need to face the fact that petitioner was tried in a volatile atmosphere under conditions where every fiber of a strong and courageous presiding judge was essential to any hope of a trial that the framers of our constitution would have thought to be "fair". The obstacles facing Judge Blythin were considerable. The popularity of the state's cause had been articulated repeatedly in the news media. Judge Blythin was a candidate for re-election by popular vote *during the course of the trial.* He had been publicly praised by the newspaper which most needed a conviction, for reasons of prestige and financial security. The trial counsel for the state was a

brother (but not a competing) candidate. Judge Blythin thought petitioner to be guilty, as the District Judge has found. This was, we think, under the circumstances of this particular case, sufficient reason for the judge to recuse himself, *sua sponte*.

But the greatest evil in this situation was the expressed notion by Judge Blythin that the case was "open and shut". Just what he meant by this phrase can never be exactly known. But the plain import of such words is that the trial was a mere formality to legally endorse a prejudged result. We submit that any judge who prior to trial in a case of this sort felt that the cause he was about to hear was of an "open and shut" nature should have recognized his preconception of the matter and withdrawn from the case. Especially significant, in view of the elaborate voir dire of the jurors, is this evidence that Judge Blythin himself had been so convinced of petitioner's guilt that he could not withhold his opinion from an eminent newslady (who was at most a perfect stranger) whom the judge wished to be advised as to the "inside" scoop. Since the judge had obviously been no part of the investigation of the case, one must conclude that he persuaded himself of Dr. Sheppard's complicity either through the conduct of the news media, or through some private communication with his son who was a member of the Cleveland homicide bureau.

In either case, we submit that this judge was not in a position to render those delicate decisions which a case of these proportions necessarily involves. There can be no doubt that a continuance or change of venue would have incurred the probable wrath of the public, and the certain wrath of the Cleveland Press. As against either kind of disfavor, Candidate Blythin was in no proper position to exercise what appellate courts generally describe as the "discretion" of the trial judge.

That there was a close decision to make as to whether a verdict might have been directed in favor of petitioner cannot now be disputed. That the judge who made this decision, unpopular and final as it might have been, should have been free from any and all extrinsic influence is manifest upon the circumstances. That Judge Blythin did not meet these requisite qualifications is similarly manifest from the evidence accepted by the two lower courts.

The Court of Appeals has expressed the view that an arbiter of Judge Blythin's bent is nonetheless qualified to preside over a trial of such overwhelming proportions, and that the principles announced by this Court in decisions relating to the necessary impartiality of a trial judge were not in point. Thus the Court of Appeals has distinguished *Tumey* v. *Ohio*, 273 U.S. 510, *In Re Murchison*, 349 U.S. 133, and other cases on their facts and has held that they do not apply to the matter at bar. With this construction of the cited cases we respectfully disagree.

This Court did not hold, in either *Tumey* or *Murchison*, that demonstrable prejudice by a presiding magistrate was shown. Both cases stand for the principle that insofar as is possible, essential fairness demands that the judge have no substantial interest in the controversy over which he presides.

The fact that petitioner had a jury does not, we submit, eliminate this principle, as the Court of Appeals has ruled. This trial judge had far too much in his own hands to escape the requirement that he approach his task, however onerous, with a courageous determination to hew to the hard rule of law without one whit of thought to what the public might appreciate. The fact that there was a jury in this case was Judge Blythin's doing in the first place. The fact that the case went to the jury was Judge Blythin's doing in the second place. And the infinite number of times when he exercised his discretion—a discretion which the

Court of Appeals seeks to rely upon—cannot be assessed. We submit that:

(1) A judge who is up for election *during* an extremely controversial and publicly watched criminal case is not a fit magistrate to preside in such a case;

(2) A judge who, being up for election, is lauded by a newspaper which has a substantial pecuniary interest in the outcome of a criminal case is not a fit magistrate to preside in such a case.

(3) A judge who harbors a personal belief that an accused is "guilty as hell" before a trial over which he is to preside commences has an obligation to make such feeling known to the accused or his counsel.

(4) A judge who harbors a personal belief that an accused is "guilty as hell" before a trial over which he is to preside commences has an obligation to recuse himself *sua sponte*.

(5) A judge who personally believes that an accused has an "open and shut" case of guilt before the trial of such accused begins has an obligation to make such fact known to the accused or his counsel.

(6) A judge who personally believes that an accused has an "open and shut" case of guilt before the trial begins has an obligation to recuse himself *sua sponte*.

(7) A trial judge who, being assigned to preside over a circumstantial controversial case, finds that he is (a) up for election by popular vote during the trial, (b) his son is a member of the police team for the prosecution, (c) a newspaper with a substantial pecuniary interest in a conviction is backing such judge for re-election, (d) has a deep personal feeling that the accused is guilty, (e) has a firm personal belief that

the case over which he is to preside is "open and shut", is not a fit judge to preside over such case.

Petitioner thus respectfully submits that the writ ought to be granted upon the question of the trial judge's impartiality, in order that some rule may be had upon the fitness of a presiding justice who is himself so infected with preconception that he believes the defendant committed to his charge to be guilty, summarily, before the trial opens.

III. The Lie Detector Evidence

The stipulations show that (1) police officers testified that petitioner refused a lie detector test, and (2) that J. Spencer Houk (who was accused by Steve Sheppard of being the murderer) was allowed to testify that he had "taken" such a test, without giving the result. The District Judge held that such evidence violated petitioner's federal constitutional rights. The Court of Appeals did not hold that such evidence was *not* so prejudicial as to rise to the stature of a federal constitutional violation, but ruled instead that petitioner was estopped to complain because the receipt of such evidence was the considered tactical choice of petitioner's trial counsel.

Because no question has been raised as to the sufficiency of this event as a violation of the due process clause, we will not beleaguer this petition with the myriad cases which uniformly hold that the receipt of lie detector evidence is horrendous error in any trial.[13] We turn instead to an examination of the facts upon which the Court of Appeals has bottomed its holding that estoppel is appropriate.

The Court of Appeals said, in avoiding direct confrontation of this issue:

> "The conduct of defense counsel regarding lie detector testimony has been discussed at length because we believe it spares us the need of determining the precise constitutional question suggested by the opinion of the District Court." Rs 47.

The lower court held in effect that defense counsel's tardy objection to testimony that petitioner had refused a lie detector test by police, and the trial judge's failure to instruct that such refusal had no probative effect *in the face of a request to do so,* were not viewable as what might otherwise be constitutional violations because of the conduct of counsel.

We submit that this most erroneous approach, ignoring completely the doctrine of *Fay* v. *Noia,* 372 U.S. 391, distorts the facts which it purports to assert as its unbilical cord. When Mr. Corrigan tried to continue or change the venue of the Sheppard trial, he cited specifically the wide publication given petitioner's refusal to take a polygraph test from police. The evil inherent in such publication was carefully noticed by the District Judge. Ra 436a. When Mr. Corrigan was faced with a trial he did not want and did not believe could be fair from the outset, it is reasonable to assume that he determined to arrange his tactics nonetheless to persuade the jury he was forced to confront.

One must assume that he believed—for indeed he so asserted without equivocation—that each tales juror, and each petit juror, knew that Sam Sheppard had shunned the police polygraph. That he did not object to, and thus highlight, the offered testimony concerning the lie detector ought not to now be asserted as evidence that he wished the jury to know these facts. We think that under the circumstances his choice—if indeed any there was, as the Circuit Court has ruled—was necessary and involuntary. To rule that in the face of such obstacles as were thrust

upon petitioner's able trial counsel it was incumbent upon him to protect the record at the risk of paying an unwarranted penalty for the exercise of such right requires the imposition of a harsh and totally unrealistic rule of law. We suggest that the Court of Appeals has, in constructing its defense to this claimed error, woven a most unsavory mantle for the reluctant trial lawyer to wear. If in fact an advocate faced with trial before what he believes to be a hostile and tainted jury must, in order to protect his client's rights, abandon all hope of an acquittal on the merits and build a record for appeal, much has been taken from our inherent thought that ours is the world's finest system for the administration of justice. We respectfully suggest that the Court of Appeals has strained unreasonably to circumvent this most serious error; and that even assuming as true all that the Court of Appeals has said, the rule it has applied is repugnant to notions of due process as these have evolved in our jurisprudence.

The writ should be granted for review of this treatment of the consequences of evidence that the accused has failed to submit to a lie-detector test.

IV. The Telephone Calls By the Jurors During Deliberations

As the opinion of the Court of Appeals discloses, members of the Sheppard jury made certain telephone calls which were not authorized by the trial court. This was done in violation of two Ohio statutes. Section 2945.32, Ohio Revised Code, provides as oath to be administered to bailiffs in charge of a sequestered jury; it further provides that an officer violating this oath—as these officers did, unquestionably—may be punished by imprisonment for one to ten years. Section 2945.33, Ohio Revised Code, speci-

fically prohibits any communication to a juror by an outsider.

The Ohio Supreme Court, in reviewing this question, refused to apply the ordinary rule that proof of communication to a juror raises a presumption of prejudice which stands until rebutted. *State* v. *Sheppard*, 165 Ohio St. 293, 298-299; Ra 113a. The District Judge viewed this as a misapplication of Ohio law, but held that under the circumstances due process had been violated in any event. Ra 473a. The Court of Appeals rejected this ruling and held in essence that because defense counsel produced no actual evidence or prejudicial content in the telephone conversations, there was no error.

As the record discloses, the bailiffs from whose phones these calls were made did not dial the numbers or hear the voices of the parties called. In view of this we think the Ohio Supreme Court's pure speculation that these conversations were innocuous, and consisted of no more than "assurance of health and welfare" by the jurors' loved ones, to be completely unwarranted.

This was a case where the pressure on the jury must have been tremendous. The fact of prolonged deliberations had no doubt alerted the public to the fact that the case was a close one in the view of the jurors. And it is reasonable to believe that the "loved ones" of these jurors, during the period of sequestered deliberations, were being given an earful of opinion by all and sundry. Some of this opinion must certainly have advocated petitioner's conviction, and it is likely that the juror's families were apprehensive of community criticism in the event of an acquittal—especially in view of the "evidence" printed in the newspapers which never was produced in court.

Added to these tenuous circumstances is the fact that the largest holiday of the year was only a few days away. Anxious husbands and wives must have been concerned

about unfinished Christmas shopping and other festive preparations. To hypothecate that a tired and puzzled citizen forced to decide Dr. Sheppard's fate was not influenced by the still unknown content of these telephone conversations does a flat injustice to petitioner. Some inflection, innuendo, or subtle hint of encouragement by a juror's spouse could easily, even if subconsciously, have done much to tip the delicately balanced judgment of a juror troubled with some reasonable doubt.

To bolster its refusal to recognize felonious conduct by the keepers of the jury as a constitutional violation, the Court of Appeals has sought to once again penalize petitioner for what it describes as a procedural default on the part of his counsel inasmuch as they failed to produce evidence of the content of these telephone conversations. But under both Ohio law and the weight of authority (*State* v. *Adams*, 141 Ohio St. 423; *Emmert* v. *State*, 127 Ohio St. 235; *Mattox* v. *United States*, 146 U.S. 140) proof of communication between jurors and third persons is presumptively prejudicial till the contrary has been made to appear. Dr. Sheppard's counsel, therefore, had no reason or obligation. If these communications were in fact harmless, it was the duty of the State to prove such fact. Under all of the circumstances in which this jury deliberated this case, there is no possible justification for reversing the general rule and holding, as the lower court has done, that these conversations were presumptively non-prejudicial.

V. Other Constitutional Violations

The District Judge, after noting what he considered to be five individual violations of the federal constitution, concluded that it would not be necessary to review the other claimed errors. He pointed out, however, that some of these had "significant merit". Ra 476a. The Court of Appeals

purported to consider each of these, and rejected them all in one summary phrase. We contend that the violations claimed were not properly disposed of in such abrupt fashion, and that in any case some of these were sufficient to have required petitioner's release.

A. *Arraignment Without Counsel:*

The stipulations clearly show that Dr. Sheppard was arraigned on a capital charge without counsel to represent him. In *Hamilton* v. *Alabama*, 368 U.S. 52, 55, this Court said: "When one pleads to a capital case without benefit of counsel, we will not stop to determine whether prejudice resulted."

We think that these circumstances are more aggravated than those in *Hamilton*, for this petitioner had counsel, asked the arraigning magistrate to wait until counsel arrived before requiring petitioner to plead, and was refused with the directive, "You can see your lawyer in jail." Counsel was at that time en route to the town hall; for some reason many newsmen had been tipped in advance that Dr. Sheppard was to be arrested (only hours, of course, after the Cleveland Press had demanded an arrest), but counsel were not informed.

Although petitioner was later arraigned again with counsel after the indictment, we think that there is no clear reason why the principle of the *Hamilton* case ought not to be applied. The arrest was not legitimate; it was triggered not by evidence amounting to probable cause, but by editorial demands. Had Mr. Corrigan been present when petitioner was brought before the magistrate, he might have taken some step to halt the snowball which was even then gaining momentum rapidly in its course to bury the petitioner. There was no excuse for not waiting for counsel to arrive, except that possibly the presses were already rolling on a last edition with the big news.

B. *The Denial of a Peremptory Challenge:*

It is stipulated that after juror Manning was excused at the request of the prosecution and alternate juror Hansen was substituted in his place, defense counsel asserted their sixth and last peremptory challenge. This was denied them by the trial judge, and juror Hansen voted to convict.

This was a denial of the equal protection of the laws. This Court has made very plain the important nature of the right to peremptory challenge. *Pointer* v. *United States*, 151 U.S. 396. Six peremptory challenges were allowed petitioner by statute, Section 2945.21 Ohio Revised Code, supra, and the trial court arbitrarily abridged this right. On very similar facts Ohio had held years before that such abridgment was prejudicial error. *Koch* v. *State*, 32 U.S. 352.

We submit that the only reason why the trial judge refused this last challenge is because it would have left the jury with no alternates, and required a mistrial if a juror became disabled. He had the means to correct this situation, but chose instead to do so at petitioner's expense. This was discriminatory action under color of state law, and a violation of the Fourteenth Amendment to the Constitution of the United States.

C. *Spoliation—The Seizure of Petitioner's House and Concealment of Evidence:*

The stipulations disclose that (Ra 150a(9)) Bay Village Police Chief took the keys to petitioner's house, with petitioner's consent. The police concluded their investigation of the premises on August 16, 1954. On August 24, a written demand by petitioner that the house be returned to him was refused. At trial, the Chief was summoned to the stand, and defense counsel took the keys. The trial court ordered that they be returned, and that they belonged to

the police. The defense was thus denied investigative access to the house until after trial.

When the verdict had been returned, a criminologist named Dr. Paul Leland Kirk was hired to reconstruct the crime. By careful study of the blood spatter he was able to do just this, as his affidavit sets forth. Ra 150a (17). In addition to showing that the killer was left-handed (petitioner is not), Dr. Kirk discovered a large blood spot in the murder room which *did not come* from petitioner or his wife.

Had the jury which decided the case had this evidence, it is almost certain that they would have acquitted. Dr. Sheppard was pounded again and again by the prosecuiton for a lack of any proof to corroborate his "fantastic" story. This was such proof. When it was presented as grounds for a new trial, it was turned aside by Ohio Courts, principally on the ground that counsel had not tried hard enough to get the keys prior to the close of the evidence.

In view of the patently incorrect ruling by Judge Blythin that the keys belonged to the police, even though the prosecution had rested its case, we think that ruling of the Court of Appeals (Ra 90a) was wrong. But in any event, because their decision rests at least in part on the assertion of a procedural default against the petitioner—in circumstances where no waiver by him can possibly be found—it should be no bar in habeas corpus. *Fay* v. *Noia*, 372 U.S. 391. The Court of Appeals has left unillumined its reasoning in concluding that state action which deprives a defendant of exculpatory evidence is not an error of constitutional magnitude; but illumined or no, we suggest that such a view is incorrect.

D. *Conduct of the Ohio Supreme Court:*

The initial determination that there was sufficient evidence to warrant petitioner's arrest was made by Richard

Weygandt, then Law Director of Bay Village. Richard's father was Chief Justice Carl V. Weygandt of the Ohio Supreme Court. The Chief Justice disqualified himself, and then appointed his own replacement, in violation of the Ohio Constitution, Article IV, Section 2, which provides that when the Chief Justice is disqualified his replacement will be appointed by the Judge remaining with the longest period of service on the court.

The case was admitted to the Ohio Supreme Court on an Appeal as of Right, and Dr. Sheppard argued by brief twenty-nine errors of law. Three of these were stressed in oral argument, and only with these three did the majority opinion deal. Ra 110a. We think under the circumstances this was a failure of review, and a denial of the equal protection of the laws—especially in view of the fact that the Court was illegally constituted in the first place. These irregularities, when viewed against the total facts of the entire case, were sufficiently important to have warranted the attention of the Court of Appeals. The failure of that Court to deal with them has further deprived petitioner of the review to which he was entitled.

VI. The Sufficiency of the Evidence:

Petitioner claimed in his petition that the Ohio Supreme Court had used a constitutionally impermissible standard in determining that the trial record contained sufficient evidence to sustain the judgment of conviction. Ra 15a. The District Judge in disposing of the case specifically withheld judgment on this issue. Ra 403a. The Court of Appeals held that a reading of the opinion of the Cuyahoga County Court of Appeals showed that the record was not so devoid of evidentiary support as to violate due process. Rs 58. It is significant that the District Court was unwilling to subscribe to such a position. It is more signi-

ficant that no court in the entire chain of review of this case has been able to state the evidence which showed that petitioner killed his wife. We trace briefly the treatment of this issue in order to highlight the frail underpinnings of the judgment which has cost a citizen ten years of his life.

The first indication of the absence of any sound case against Dr. Sheppard is found in Prosecutor Mahon's attempt to sum up for the trial judge, at the close of the state's presentation in chief, the evidence which should bar a directed verdict. We have reproduced this argument in our appendix, because it clearly shows an absence of any legal proof to connect petitioner with the death. Rs 165. When Mr. Mahon had completed his efforts, Judge Blythin said:

> "I have one question: * * * is all this * * * equally as consistent with the innocence of Sam Sheppard as his guilt?" Tr. 5001; Rs .

Judge Blythin then ruled that this was a question for the jury, which it clearly was not. It is fundamental that evidence tending to support equally two inconsistent propositions is not proof of any kind, insufficient to support a civil judgment. He therefore avoided a critical ruling of law.

The Cuyahoga County Court of Appeals summarized at some length (Ra 63a-80a) the evidence in the case, but offered no rationale as to why such evidence might be viewed as excluding all reasonable hypotheses other than guilt. We strongly contend that this summary does *not* pass the initial barrier of showing a case "not so totally devoid of evidentiary support" as to violate due process.

The majority of the Ohio Supreme Court purported to confront this issue, but did not. It held that where a circumstantial case is submitted to a jury under proper instruc-

tions, a resulting conviction is ample proof that there was sufficient evidence. Ra 114a. This circuitous reasoning is totally invalid, for under such a rule no evidence at all would be necessary—only a proper charge by the trial court.

The dissent in the Ohio Supreme Court was, however, remarkable indeed. Judge Kingsley A. Taft (now Chief Justice Taft) expressed the opinion that not only had the state failed to prove guilt; it had in fact *proved innocence with its own evidence:*

> ". . . the state established by its evidence facts and circumstances which cannot be reconciled with any hypothesis other than defendant's innocence." Ra 119a.

We do not ask this Court to now review on certiorari the entire trial transcript is an effort to determine whether the record is barren of evidentiary support. But we do contend that if it were to be found that none of the other claimed violations are found to require issuance of the habeas writ, this issue has not been adequately litigated by a federal court. And certainly the paucity of relevant proof is of prime importance in assessing the prejudicial nature of the other errors, for on such a close question as this jury had before it seemingly minor irregularities in the proceedings could easily have influenced the verdict.

The "Great Writ" is certainly one of our noblest institutions, and its flexibility as a means to prevent unjust restraint has recently been re-emphasized by this Court. It has in many situations effectuated the release of criminal defendants where the record showed clear proof of guilt. But even though it reaches violations of important rights rather than errors of fact committed by juries, it can have no higher purpose than the release of innocent men wrongly incarcerated. Your petitioner sharply challenges the valid-

ity of the Ohio judgment in fact as well as in law, and vigorously contends that someone, somewhere, ought to be required to show proof of his crime which satisfied minimum requirements of due process. This has not been, and indeed cannot be, done.

VII. The Aggregation of Error

The majority of the Court of Appeals has held that where in its judgment none of the violations found by the District Judge rises to constitutional stature, the combined effect of these errors can be no greater than any of the individual claims. Rs 93. Judge Edwards in his dissent challenges this principle as incorrect, and maintains that possible constitutional violations must be viewed against the total background of the case.

We respectfully contend that the majority have committed fundamental error in their holding. Incidents such as the decisions below have reviewed cannot be fairly excised from the context in which they occurred, and judged in a vaccum. Nor can it be said that the combination of intrusions upon a defendant's rights can never be more grave than any of the parts.

The record we challenge is fairly riddled with error of every kind. Every basic element essential to a fair trial is shown to be lacking. The violations visited upon Dr. Sheppard are frequently interconnected with each other, showing a pattern of official conduct which time and time again fell below minimum standards of due process. The jury was tainted, the judge was biased, the prosecutor was unfair, the evidence was unfair and the reviewing courts of Ohio dodged and strained to pull together the shreds of a shabby conviction. If no single incident in these entire proceedings was sufficient to vitiate the conviction, certainly the aggregate is more than sufficient. With irregularities at

every turn, it cannot be said that this defendant had a fair trial.

A legal case must be viewed not only as a chain, but as a cable; and it is this which the Court of Appeals has failed to recognize. After examining what it saw as a chain, that court determined that none of its links, no matter how badly tortured and twisted, had actually snapped; thus the conviction could be held together. But this approach ignores the necessary corollary view that just as a cable which is so frayed that many of its strands are broken will not hold against its load, a trial peppered with errors of less than reversible magnitude is too infirm to warrant the deprivation of a citizen's liberty. Although we think that neither chain nor cable survives this record, we suggest that the Court of Appeals has made a serious jurisprudential mistake in holding as it did. Judge Weinman thought this trial to have been a "mockery of justice". Ra 476a. Against this view of the total matter, the Court of Appeals sought to whittle down, through the process of isolated dissection, the defects found. We respectfully contend that on this ground alone a writ of certiorari should be granted.

Conclusion

For the reasons stated above, petitioner respectfully suggests that a writ of certiorari ought to issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

No. 16077

United States Court of Appeals

FOR THE SIXTH CIRCUIT

SAMUEL H. SHEPPARD,
Petitioner-Appellee,
v.
E. L. MAXWELL, Warden,
Respondent-Appellant.

APPEAL from the U.S. District Court for the Southern District of Ohio.

Decided May 5, 1965.

Before O'SULLIVAN, PHILLIPS and EDWARDS, Circuit Judges.

O'SULLIVAN, Circuit Judge. Appellant, Warden of the Ohio State Penitentiary, appeals from a United States District Court order declaring void the 1954 conviction of petitioner, Dr. Samuel H. Sheppard. Judgment had been entered in the Court of Common Pleas of Cuyahoga County, Ohio, upon a jury verdict convicting Sheppard of the second-degree murder of his wife.[1] Upon his appraisal of

[1] Marilyn Sheppard, petitioner's pregnant young wife, was bludgeoned to death in the bedroom of her lakeshore home during the early morning hours of July 4, 1954. Dr. Sheppard told police that he had been wakened from his sleep on a couch in the downstairs living room by a noise or cry from upstairs, ascended the stairs, and was knocked unconscious while grappling with an unidentifiable white "form" standing next to his wife's bed. He further stated that upon recovering, he pursued the form out of the house, to be again knocked out while struggling on the shore. The evidence disclosed that Dr. Sheppard had recently been unfaithful to his wife.

trial and pretrial publicity and other matters, the District Judge concluded that Dr. Sheppard did not have a fair trial and was thus deprived of rights guaranteed him by the United States Constitution. His order granted bail to Dr. Sheppard and released him from the Ohio Penitentiary where he had been confined under a life sentence since his conviction in 1954. Ohio was granted 60 days within which to take further action against Dr. Sheppard. *Sheppard* v. *Maxwell*, 231 F. Supp. 37 (July 15, 1964). This Court has stayed the order fixing such time limitation.

Sheppard's conviction and the denial of his motion for new trial on grounds of newly discovered evidence were both affirmed on appeal by the Court of Appeals for Cuyahoga County, Ohio. *State* v. *Sheppard*, 100 Ohio App. 345, 128 NE(2) 471 (1955); *State* v. *Sheppard*, 100 Ohio App. 399, 128 NE(2) 504 (1955). The Ohio Supreme Court dismissed an appeal from the decision affirming the denial of a new trial in *State* v. *Sheppard*, 164 Ohio St. 428, 131 NE(2) 837 (1956), and affirmed the conviction in *State* v. *Sheppard*, 165 Ohio St. 293, 135 NE(2) 340 (1956), two judges dissenting. Application for certiorari was denied by the United States Supreme Court, *Sheppard* v. *Ohio*, 352 U.S. 910, 1 L. Ed.(2) 119 (1956), and rehearing was denied, *Sheppard* v. *Ohio*, 352 U.S. 955, 1 L. Ed.(2) 245 (1956). Dr. Sheppard's later petition to the Supreme Court of Ohio for a writ of habeas corpus was denied. *State, ex rel. Sheppard* v. *Alvis*, 170 Ohio St. 551, 167 NE(2) 94 (1960). Dr. Sheppard thus has had the benefit of all the processes of law provided by the State of Ohio, and the United States Supreme Court did not see fit to take the case for its review.

The habeas corpus proceeding here involved was commenced in the United States District Court April 11, 1963, charging, as amended, some 23 separate constitutional defects in Sheppard's conviction. Some of these had already

been found without merit by the Ohio Courts and others were new. Indicating his view that there were probably other constitutional imperfections in Dr. Sheppard's trial, the District Judge bottomed his decision on four separate grounds, (1) newspaper publicity before and during the trial denied Sheppard a fair trial, (2) the trial judge should have disqualified himself, (3) evidence that Sheppard had refused to take a lie detector test and that another witness had taken such a test was improperly brought before the jury, and (4) the bailiffs in charge of the jury after the cause was submitted to it improperly allowed individual jurors to make telephone calls to their families. Grounds 1 and 4 were passed upon in the Ohio Court of Appeals and Supreme Court and were found to be without merit. They were also relied upon in the application to the United States Supreme Court for certiorari, which was supported by the same volumes of newspaper publicity as are before us. Ground 2 and part of ground 3 were first asserted in the instant petition for habeas corpus.

We are of the opinion that the release of Dr. Sheppard was improvident, and that the District Court order should be vacated and Dr. Sheppard remanded to the custody of the respondent Warden of the Ohio Penitentiary.

Before detailed discussion of the issues before us, it should be preliminarily observed that Dr. Sheppard was released not because of any evidentiary showing that the jury was prejudiced by the newspaper and other publicity or that the trial judge exhibited partiality or prejudice in his conduct of the trial, nor because of any evidence that the jurors' calls to their homes contained any improprieties. The District Judge presumed that the judge and the jury must have been so affected by the publicity and other events as to be unable to discharge their respective responsibilities in keeping with constitutional standards. Reviewing substantially the same record as did the District

Judge here, the appellate machinery of Ohio, challenged to do so, was unable to discern the evils now presumed by the District Judge. Aware that as a matter of formal rule, denial of certiorari by the United States Supreme Court does not bespeak its approval of a state court decision, we do mention that critical points now made by Dr. Sheppard did not excite the Supreme Court to take for review this case now characterized by the District Judge as "a mockery of justice."

The District Judge's comprehensive and painstakingly prepared opinion exhibits his searching and laudable zeal to protect Dr. Sheppard's constitutional rights. He cast a wide and fine net over Dr. Sheppard's trial and its background, gathering in many imperfections each of which was found to have offended the United States Constitution.[2] This conclusion is reached notwithstanding that on the main points discussed some nine Ohio judges of the Common Pleas Court, the Court of Appeals, and the Supreme Court, did not find error or constitutional vice in the Sheppard trial and that the case "did not commend itself to at least four members of the [United States Supreme] Court as falling within those considerations which should lead this Court to exercise its discretion in review-

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[2] The District Judge said, "The Court . . . has found five separate violations of petitioner's constitutional rights, i.e., failure to grant a change of venue or a continuance in view of the newspaper publicity before trial; inability of maintaining impartial jurors because of the publicity during trial; failure of the trial judge to disqualify himself although there was uncertainty as to his impartiality; improper introduction of lie detector test testimony and unauthorized communications to the jury during their deliberations. *Each* of the aforementioned errors is *by itself* sufficient to require a determination that petitioner was not afforded a fair trial as required by the due process clause of the Fourteenth Amendment. And when these errors are cumulated, the trial can only be viewed as a mockery of justice. For this reason, it is not necessary to consider the remainder of the 23 stipulated issues, which range from having *significant merit* to no merit at all." 231 F. Supp. 71. (Emphasis supplied.)

ing a lower court's decision." *Sheppard* v. *Ohio*, 352 U.S. 910, 911, 1 L. Ed.(2) 119 (remarks of Frankfurter, J.). Other points now found to be of constitutional magnitude evidently did not appear of sufficient significance to prompt Dr. Sheppard's counsel to assert them as error on appeal.

Aside from the question of lie detector evidence, which we find without merit, the judgment of the District Court cannot be affirmed unless we are willing to accept its conclusion that the jurors who heard this case were, wittingly or unwittingly, false to their oaths; or that the trial judge, deceased before the start of this habeas corpus proceeding, was guilty of impropriety in sitting as a judge at the Sheppard trial. We cannot join in such conclusions, notwithstanding our agreement with the District Judge's characterization of the conduct of some of the Cleveland press as being shameful journalism, certainly not conducive to the judiciary's continuing concern for the freedom that the press insists should at all times be accorded to it. Contemporary American society would be greatly benefited if those members of the press and other media of information who offend in this regard were as conscious of and devoted to their responsibilities as they are solicitous that their privileges remain unimpaired. Good would also be the product of greater restraint by prosecutors and other members of the bar who indulge in public and truculent announcement of their trial plans and ammunition.

An initial question should be disposed of. The respondent warden now charges that the District Court was without jurisdiction to entertain the instant habeas corpus action, asserting that Dr. Sheppard has not exhausted remedies still available in the state courts of Ohio, citing 28 U.S.C.A. § 2254. He contends that application for delayed appeal is still available to petitioner under Ohio Revised Code § 2953.05 as to errors not already considered by the Ohio court, and that under Ohio Revised Code § 2725.02, habeas

corpus may also be presently employed to present federal constitutional questions to the Ohio courts. In his answer to the petition for habeas corpus, however, respondent admitted "that petitioner has exhausted all his remedies in the courts of Ohio. . . ." Whether such response constitutes a judicial admission foreclosing present consideration of the jurisdictional question and whether, assuming the court's right to now consider exhaustion of remedies, petitioner has exhausted his state remedies as required by 28 U.S.C.A. § 2254, are interesting questions. We pass them, however, believing that since the District Judge has entertained the application for habeas corpus and ruled on the merits, we have the right to, and should, dispose of the appeal before us on its merits. Particularly is that so since the result of our determination is in a sense a vindication of the state courts. Compare the Third Circuit rule that exhaustion is not required prior to a ruling against the merits of a state prisoner's petition, *United States ex rel. Drew* v. *Myers,* 327 F(2) 174 (CA 3, 1964); *In re Thompson,* 301 F(2) 659 (CA 3, 1962); *In re Ernst,* 294 F(2) 556 (CA 3, 1961), *cert. denied,* 368 U.S. 917 (1961).

We shall discuss the merits under the headings of Publicity, Disqualification of Judge Blythin, Lie Detector Evidence, Communications with Jurors, and Other Questions.

1) *Publicity.*

We should at the outset confess a certain temptation to yield to today's accelerating current of excitement and concern about undue press coverage of criminal charges and trials, and to affirm petitioner's release as dramatic vindication of the bar's contention that some of its own members and some of the various media of information have by misuse of their rights prevented our courts from according fair trial to all who are accused of crime. Doubts as to the efficacy and propriety of such action, however, are supplemented by the certain knowledge that it is our

duty as federal judges to avoid a state judgment of conviction only where some constitutional infirmity may be found. Careful consideration of this case leads to the conclusion that no such infirmity infects Dr. Sheppard's conviction. The frequently quoted prefatory paragraph to the opinion of Judge Bell, who wrote for the Ohio Supreme Court in affirming the conviction of Dr. Sheppard, provides appropriate introduction to the publicity aspect of the present case:

> "Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. Special seating facilities for reporters and columnists representing local papers and all major news services were installed in the courtroom. Special rooms in the Criminal Courts Building were equipped for broadcasters and telecasters. In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life." 165 Ohio St. 294.

It should be observed here, however, that no rule of law, no procedural device, and no constitutional guarantee could then or now erase the murder of Dr. Sheppard's wife or its circumstances; such events inevitably cast the Sheppard trial into the setting so graphically described by Judge Bell. Judge Bell's accurate observation, in our view, merely demonstrates that the Ohio Supreme Court was fully aware of the subject before it. The fact that two of the Ohio judges dissented bespeaks the searching and vigor that must have attended the deliberations of the seven

judges whose decision ended Ohio's appellate review of the matter now before us.

The Supreme Court of the United States also had Judge Bell's preface before it. Justice Frankfurter recited it in full in his memorandum. The main points earnestly pressed upon the District Judge and this Court are not the belated discovery of Dr. Sheppard's present counsel.

Before examining in detail the nature of the publicity given Dr. Sheppard's case, it is well to note that he must carry the burden of demonstrating the constitutional vice in his conviction. As stated by the First Circuit in another publicity case, "the question whether jurors are impartial in the constitutional sense is one of mixed law and fact as to which the challenger has the burden of persuasion. . . ." *Geagan v. Gavin,* 292 F(2) 244, 246 (CA 1, 1961), *cert. denied,* 370 U.S. 903 (1962). This burden is one which must be carried " 'not as a matter of *speculation but as a demonstrable reality.*' " *United States ex rel. Darcy* v. *Handy,* 351 U.S. 454, 462, 100 L. Ed. 1331, 1338 (1956) (emphasis supplied); *Stroble* v. *California,* 343 U.S. 181, 198, 96 L. Ed. 872, 885 (1952). See also *Adams* v. *United States ex rel. McCann,* 317 U.S. 269, 281, 87 L. Ed. 268, 276 (1942).

Formally, the errors charged in this area of publicity are the District Judge's denial of motions for a change of venue, for a postponement of trial, and for mistrial.[3] It is

[3] A stipulation of issues in the District Court raised the questions whether petitioner's rights were violated by publication of a list of veniremen in advance of trial, or by the trial judge's failure to sequester the jury *sua sponte.* The District Judge stated these issues were considered under the publicity heading, and it appears that he found a deprivation of due process in each claim. We are unable to agree.

As a lawyer who through many years has observed the regular publication of the names of the venire in the local paper in advance of the term at which they were to serve, the writer of this opinion finds novel indeed the contention that "the publication of a list of veniremen thirty days in advance of trial, thus subjecting said veniremen to opinions of others during the thirty day period [was] a violation of petitioner's constitutional rights." Neither citation of authority nor

the law of Ohio that these are matters for a trial judge's discretion, not subject to review except for abuse thereof. *Townsend v. State,* 17 C.C. (N.S.) 380, 25 O.C.D. 408, *aff'd,* 88 Ohio St. 584, 106 NE 1083 (1913); *Richards* v. *State,* 43 Ohio App. 212, 215, 183 NE 36 (1932); *Dorger* v. *State,* 40 Ohio App. 415, 419, 179 NE 143 (1931), *appeal dismissed,* 124 Ohio St. 659, 181 NE 881 (1931), *cert. denied,* 284 U.S. 689, 76 L. Ed. 581 (1932); *State* v. *Stemen,* 90 Ohio App. 309, 310, 106 NE(2) 662 (1951), *cert. denied,* 342 U.S. 949, 96 L. Ed. 705 (1952); *State* v. *Deem,* 154 Ohio St. 576, 97 NE(2) 13 (1951); *State* v. *Sheppard,* 165 Ohio St. 293, 296, 135 NE(2) 340 (1956), *cert. denied,* 352 U.S. 910, I L. Ed. (2) 119 (1956). Such is the law in other states. 24A C.J.S. *Criminal Law* §§1864, 1865, 1866, p. 715 & n. 16 (1962). And dealing particularly with allegedly prejudicial publicity, this is the Federal rule as well. *Estes* v. *United*

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judicial reason is offered in support of this claim, and we find it unpersuasive.

We find equally unpersuasive the claim based on failure to sequester the jury. No formal request therefor was made at any time by the prosecution or defense. We cannot speculate now whether able defense counsel would have welcomed such a procedure, or whether long insulation and confinement of a jury trying a first degree murder case might be thought more likely to lead to conviction and a death penalty than permitting a jury the relaxation and refreshment of living at home, even with the possible exposure to extracurial publicity. Eminent advocates might be in disagreement on the point. *Cf. United States* v. *Provenzano,* 334 F(2) 678, 696 (CA 3, 1964), *cert. denied,* 379 U.S. 947 (1964). We cannot now speculate as to why defense counsel withheld such a request. There is no record to tell us whether the suggestion may have been made in Chambers and there opposed by defense counsel. That point was never made to the Ohio courts. And we will certainly not, in the context of this case and at this distance, find constitutional vice in the trial judge's failure to do what was not requested of him. Compare *Odell* v. *Hudspeth,* 189 F(2) 300, 303 (CA 10, 1951), *cert. denied,* 343 U.S. 873, 96 L. Ed. 656 (1951); *Wheeler* v. *United States,* 165 F(2) 225, 229 (CA D.C. 1947), *cert. denied,* 333 U.S. 829, 92 L. Ed. 1115 (1948); *Stephan* v. *United States,* 133 F(2) 87, 99 (CA 6, 1943), *cert. denied,* 318 U.S. 781, 87 L. Ed. 1148 (1943). It should be noted here that his failure to sequester the jury *sua sponte* was not charged as error on Sheppard's appeal.

States, 335 F(2) 609, 614 (CA 5, 1964), *cert. denied,* 379 U.S. 964 (1965); *United States* v. *Lombardozzi,* 335 F(2) 414, 416-17 (CA 2, 1964), *cert. denied,* 379 U.S. 914 (1964); *Hoffa* v. *Gray,* 323 F(2) 178 (CA 6, 1963), *cert. denied,* 375 U.S. 907 (1963); *United States* v. *Decker,* 304 F(2) 702, 704 (CA 6, 1962); *Bearden* v. *United States,* 304 F(2) 532 (CA 5, 1962), *vacated on other grounds,* 372 U.S. 252 (1963), *on remand,* 320 F(2) 99, 101-03 (CA 5, 1963), *cert. denied,* 376 U.S. 922 (1964); *Greenhill* v. *United States,* 298 F(2) 405 (CA 5, 1962), *cert. denied,* 371 U.S. 830 (1962); *Blumenfield* v. *United States,* 284 F(2) 46 (CA 8, 1960), *cert. denied,* 365 U.S. 812 (1961); *Dillon* v. *United States,* 218 F(2) 97, 103 (CA 8, 1955), *cert. dismissed,* 350 U.S. 906, 100 L. Ed. 796 (1955); *Kersten* v. *United States,* 161 F(2) 337 (CA 10, 1947), *cert. denied,* 331 U.S. 851, 91 L. Ed. 1859 (1947); *Shushan* v. *United States,* 117 F(2) 110 (CA 5, 1941), *cert denied,* 313 U.S. 574, 85 L. Ed. 1531 (1941); *United States* v. *Hirsch,* 74 F(2) 215, 218-19 (CA 2, 1934), *cert. denied,* 295 U.S. 739, 79 L. Ed. 1686 (1935).

In the case at bar, the trial judge held in abeyance the motions for change of venue and for continuance, advising that he would first by a voir dire examination determine whether a fair jury could be selected notwithstanding the alleged prejudicial publicity. Under Ohio law, this was proper procedure. Prior to Dr. Sheppard's conviction, the Ohio Supreme Court had approved a lower court statement,

> "The examination of jurors on their *voir dire* affords the best test as to whether or not prejudice exists in the community against the defendant; and where it appears that the opinions as to the guilt of the defendant of those called for examination for jurors are based on newspaper articles and that the opinions so formed are not fixed but would yield readily to evidence, it is not error to overrule an

application for a change of venue." *Townsend* v. *State*, *supra*.

In sustaining the conviction of Dr. Sheppard, the Ohio Supreme Court said,

> "For example, in *Richards* v. *State*, 43 Ohio App., 212, 183 N.E., 36, it was held that the exercise of the right to order a change of venue lies in the trial court's discretion, and that a refusal to order a change of venue without prejudice until it can be determined whether a fair and impartial jury can be impaneled is not an abuse of discretion. . . .
>
> "If the jury system is to remain a part of our system of jurisprudence, the courts and litigants must have faith in the inherent honesty of our citizens in performing their duty as jurors courageously and without fear or favor. Of the 75 prospective jurors called pursuant to this venire only 14 were excused because they had formed a firm opinion as to the guilt or innocence of the defendant. A full panel was accepted before this venire was exhausted, and defendant exercised but five of his allotted six peremptory challenges.
>
> "In the light of these facts, and particularly in the light of the fact that a jury was impaneled and sworn to try this case fairly and impartially on the evidence and the law, this court can not say that the denial of a change of venue by the trial judge constituted an abuse of discretion." *State* v. *Sheppard*, 165 Ohio St. 296-97.

In determining whether Dr. Sheppard has carried the burden of demonstrating the unconstitutionality of his trial, surrounded as it was by pervasive publicity, it is our duty to review independently this voir dire examination of the prospective jurors in the state court. *Irvin* v. *Dowd*, 366 U.S. 717, 723 (1961); *United States ex rel. Bloeth* v.

Denno, 313 F(2) 364, 372 (CA 2, 1963), *cert. denied*, 372 U.S. 978 (1963); *United States ex rel. Brown* v. *Smith*, 306 F(2) 596, 602 (CA 2, 1962), *cert. denied*, 372 U.S. 959 (1963); *Geagan* v. *Gavin*, *supra*, 292 F(2) 246-47. The voir dire examination fills nearly 1600 pages in the record of the present case. Each prospective juror was questioned about his acquaintance with the pretrial publicity, and each of those who ultimately returned the guilty verdict swore that such publicity had created in his mind no opinion as to the guilt or innocence of the defendant and would not affect his deliberations. A reading of the voir dire discloses its thoroughness and careful inquiry as to any effect that publicity might have had on the veniremen. We find it without substantial fault and neither has counsel pointed to any insufficiency or impropriety in it. We indeed find no justification for present counsel's assertion that the City of Cleveland had been turned into a "jungle of wolves."[4] Our own review of the voir dire transcript makes it clear that the extensive questioning of each juror by the court and counsel, and the admonitions given them, forcefully impressed on their consciences their solemn responsibility and their duty to consider nothing but what properly came before them in the courtroom. Since it is obvious that this examination of the jurors affords no support for petitioner's position, the only part of the publicity question that remains in the case, as it has been

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[4] The trial judge's awareness of the importance of the voir dire is portrayed by the following admonition, given to some prospective alternate jurors:

> "A fair and an impartial juror is a juror who can sit here patiently and who can listen to all of the evidence that is produced in a case and to the instructions of the court as to the law applicable to the particular case, and who can honestly close out the rest of the world for the moment and bring a curtain down on all information he may have about the matter from other sources, and be guided entirely by the evidence and the instructions of the Court as to the law applicable to the particular case."

submitted to us, is whether there exists some basis for disregarding the jurors' unanimous sworn statements of impartiality. We are offered nothing to support a finding of mass perjury—or unwitting incompetence of the jurors to obey their oaths—beyond the nature of the publicity itself. The District Court ruled, however, that "This Court . . . has no compunction in finding that the publicity was so prejudicial to petitioner that *the assurance of the jurors must be disregarded.* . . ." 231 F. Supp. 59. (Emphasis supplied.) Summarizing this conclusion in different words, the opinion further states that "the prejudicial effect of the newspaper publicity was so manifest that no jury could have been seated at that particular time in Cleveland which would have been fair and impartial regardless of their assurances or the admonitions and instructions of the trial judge ." 231 F.Supp. 60. To evaluate this finding we must turn to a brief summary of the pretrial publicity involved. We need not choose between one gentle characterization of some of this publicity by the Ohio Attorney General as "nothing more than inane and innocuous reporting" and present counsel's borrowed condemnation of the Sheppard trial as " 'a God-damned shame.' " The District Judge's opinion details what we assume he considered the worst of it. From his recital and our own review, we attempt a general summary of its character. It began with the report of the murder of Mrs. Sheppard. The brutality of the murder and Dr. Sheppard's version of its bizarre circumstances combined to make it front page, headline news. This was as inevitable as the immediate speculation by officials and the public as to who had done it. Early news stories contained accounts of police efforts to question Dr. Sheppard and noted the fact that from the day of the murder he generally acted, and talked to police, only with the advice and direction of two lawyers, Arthur Petersilge and William Corrigan, the

latter a leader of the criminal bar of Cleveland. Throughout were many human interest stories laudatory of Dr. Sheppard's career. His own, his brother's and his attorneys' extensive exculpatory statements were also given front page prominence. Soon, however, and with increasing impatience, there began to appear news items evidencing the press' belief that Dr. Sheppard was being unduly sheltered. The Cleveland Press in particular became violently critical of what its editor considered a failure of police authorities to press investigation of the crime. It urged quick apprehension and "grilling" of the deceased's husband, who was at least once characterized as the "chief suspect." Dr. Sheppard's refusal to take a lie detector test was headlined, but attention was also given to his explanation that he felt that such testing could be misleading because of his emotional condition and his doubt of the reliability of such tests. It was intimated that Bay Village authorities, friendly to Dr. Sheppard, were joining his attorneys in surrounding him with undeserved protection. Certainly little sophistication was required for a reader to become aware that the Cleveland Press entertained strong suspicion that Dr. Sheppard had killed his wife, although at times the Press suggested that Sheppard should clear suspicion from himself by submitting to adequate questioning. All of this was indeed stated in more violent and colorful language than we employ in attempting to summarize it. Accompanying the accounts of the progress of the investigation were reports of Dr. Sheppard's steadfast denial of guilt and presumably accurate accounts of his own early, self-exculpatory narration of the events of the murder night. The press has always claimed the right to prod public officials, obedient to what it considers its high duty to protect the public weal; it frequently presses the exercise of this claimed right with crusading zeal. That it can be wrong and that often it

sacrifices good taste and fairness to circulation is rarely admitted by the fourth estate. Certainly the Cleveland Press' discharge of its claimed duty in the Shappard case could have been adequately pursued with less obtrusiveness. We need not here decide whether the Bay Village authorities, or the Cuyahoga County coroner or the Cleveland police did or did not need the urging provided by the Cleveland Press.[5] It has not been asserted that the police authorities were without the faults charged to them, although it might fairly be inferred that the Press' meddling probably impeded more than it helped.

It should be emphasized that nowhere in the news items is there any hint or suggestion that Dr. Sheppard confessed or admitted his guilt, or any claim that he had a criminal record or had been other than an exemplary citizen, or any clear assertion that the press or the police had any direct evidence of his guilt. Comments to the press by police officials, and even prosecutors, occasionally exceeded the bounds of propriety, but they too reveaied no more than that some though that Dr. Sheppard was guilty. In addition to the pretrial publicity set forth in the District Court opinion, the Cleveland papers also published items emphasizing Dr. Sheppard's protestations of innocence.[6]

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[5] The dissent states that a Cleveland Press representative made a public boast that his paper's handling of the Sheppard story produced the trial. Petitioner's brief makes such assertion but does not provide a supporting appendix reference.

[6] Samples of headlines in the Cleveland Press, the Cleveland News, and the Cleveland Plain Dealer are:

"Exclusive! 'I Loved My Wife—She Loved Me,' Sheppard Tells News Reporter."

"Dr. Sam Writes His Own Story."

"I am Not Guilty of the Murder of My Wife, Marilyn. How could I, who have been trained to help people and devoted my life to saving life, commit such a terrible and revolting crime?"

"Sheppard Lawyers Hit Stories on Murder."

"Dr. Sheppard's Statement Issued to Answer Gossip."

We turn then to the two cases relied upon by the District Court in ruling that such pretrial publicity per se deprived petitioner of a fair trial, *Irvin* v. *Dowd*, 366 U.S. 717 (1961), and *Rideau* v. *Louisiana*, 373 U.S. 723 (1963). In each case the United States Supreme Court set aside state court convictions which had been affirmed in the highest courts of those states against charges of prejudicial publicity. It held that the prejudice in each case was so great that traditional voir dire procedures and admonitions were unavailing to insure a fair trial. It is clear that the publicity involved in these cases was significantly different from the publicity surrounding Dr. Sheppard. In *Irvin* v.

"Bay Doctor Talks to Reporter."
"Husband Puts $10,000 up For Slayer."
"Text of Doctor's Statement on his Offer of Reward."
"Doctor Will Help in Hunt for Death Weapon Today."
"Honored Athlete at Heights High."
"Dr. Sheppard Returns to Bay View Hospital to Treat his Patients."
"Drunk 'Confesses' but Story Fizzles."
"Dr. Sheppard Tells Press 'Killer Will Be Caught.'"
"Text of Statement by Corrigan After Arrest of Client, Dr. Sam."
"Police Cordial, Polite as They Take Sheppard."
"Family Points to Bay Man as New Suspect as Hoversten Talks."
"Dr. Sam is Anxious to Take Stand, His Brother Says."
"Battles Prowler in Bay. Corrigan Links Boy's Story With Sheppard Case."
"Dr. Steve Hits 'Red Herring' Accusation."
"Dr. Sam Just Like Brother, 2 Sisters-in-law Say at Trial."
"Dr. Sam Says: 'I Wish There Was Something I Could Say —But There Isn't.'"
"Jail Mate Says Dr. Sam Talks of His Innocence."
"Brother Says Police Aimed to Play on Dr. Sam's Concern."
"Brother Says Dr. Sam Anxious to Take the Witness Stand."
"Not Guilty, Sheppard Says; Asks No Bail."
"Can't Get Fair Trial—Dr. Sam."
"Own Sleuth Put on Case by Corrigan."
"Dr. Steve Challenges Prosecutor's Charge."
"Sheppard Home Bloodstains Are Proven Animal's." [By defense tests.]

These headlines were followed by text supporting Dr. Sheppard's claim of innocence.

Dowd, the Indiana court had denied a second change of venue. The Supreme Court recited these facts:

> "'Six murders were committed in the vicinity of Evansville, Indiana, two in December 1954, and four in March 1955. The crimes, extensively covered by news media in the locality, aroused great excitement and indignation throughout Vandenburgh County, where Evansville is located, and adjoining Gibson County, a rural county of approximately 30,000 inhabitants. The petitioner was arrested on April 8, 1955. Shortly thereafter, the Prosecutor of Vanderburgh County and Evansville police officials issued press releases, which were intensively publicized, *stating that the petitioner had confessed to the six murders.*'
>
> ". . . curbstone opinions, not only as to petitioner's guilt but even as to what punishment he should receive, were solicited and recorded on the public streets by a roving reporter, and later were broadcast over the local stations. . . . These stories [newspaper, radio and T.V.] revealed the details of his background, including a reference to crimes committed when a juvenile, his convictions for arson almost 20 years previously, for burglary and by a court-martial on AWOL charges during the war. He was accused of being a parole violator. The headlines announced his police line-up identification, that he faced a lie detector test, had been placed at the scene of the crime and that the six murders were solved but petitioner refused to confess. Finally, they announced *his confession to the six murders* and the fact of his indictment for four of them in Indiana. They reported *petitioner's offer to plead guilty* if promised a 99-year sentence, but also *the determination*, on the other hand, of the

prosecutor to secure the death penalty, and that petitioner had confessed to 24 burglaries (the *modus operandi* of these robberies was compared to that of the murders and the similarity noted). One story dramatically relayed the promise of a sheriff to devote his life to securing petitioner's execution by the State of Kentucky, where petitioner is alleged to have committed one of the six murders, if Indiana failed to do so. . . . On the day before the trial the newspapers carried the story that Irvin *had orally admitted the murder of Kerr* (the victim in this case) *as well as 'the robbery-murder of Mrs. Mary Holland; the murder of Mrs. Wilhelmina Sailer in Posey County, and the slaughter of three members of the Duncan family in Henderson County, Ky.'* " 366 U.S. 719-20, 725-26. (Emphasis supplied.)

Turning then to the attempt to select an impartial jury, the Supreme Court went on:

"The panel consisted of 430 persons. The court itself excused 268 of those on challenges for cause as having fixed opinions as to the guilt of petitioner; 103 were excused because of conscientious objection to the imposition of the death penalty; 20, the maximum allowed, were preemptorily challenged by petitioner and 10 by the State; 12 persons and two alternates were selected as jurors. . . . An examination of the 2,783-page *voir dire* record shows that 370 prospective jurors or almost 90% of those examined on the point (10 members of the panel were never asked whether or not they had any opinion) entertained some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty." 366 U.S. 727.

"Here the 'pattern of deep and bitter prejudice' shown to be present throughout the community . . . was clearly reflected in the sum total of the *voir dire*

examination of a majority of the jurors finally placed in the jury box. *Eight out of the 12 thought petitioner was guilty.*" Ibid. (Emphasis supplied.)

Coming to the other case chiefly relied upon by the District Court, *Rideau* v *Louisiana,* we find its facts, like those in *Irvin* v. *Dowd,* gravely undermine any claim that it supports Dr. Sheppard's position. *Rideau* also involved a state court's denial of a motion for change of venue, made on the ground that public knowledge of the crime in the parish prevented the selection of an impartial jury. The Supreme Court's following recital of the facts at once exposes its inappositeness here.

"On the evening of February 16, 1961, a man robbed a bank in Lake Charles, Louisiana, kidnapped three of the bank's employees, and killed one of them. A few hours later the petitioner, Wilbert Rideau, was apprehended by the police and lodged in the Calcasieu Parish jail in Lake Charles. The next morning a moving picture film with a sound track was made of an 'interview' in the jail between Rideau and the Sheriff of Calcasieu Parish. This 'interview' lasted approximately 20 minutes. It consisted of interrogation by the sheriff *and admissions by Rideau that he had perpetrated the bank robbery, kidnapped, and* murder. Later the same day the filmed 'interview' was broadcast over a television station in Lake Charles, and some 24,000 people in the community saw and heard it on television. The sound film was again shown on television the next day to an estimated audience of 53,000 people. The following day the film was again broadcast by the same television station, and this time approximately 29,000 people saw and heard the 'interview' on their television sets. Calcasieu Parish has a population of approximately 150,000 people.

* * * * *

> "*Three members of the jury which convicted him had stated on* voir dire *that they had seen and heard Rideau's televised 'interview' with the sheriff on at least one occasion. Two members of the jury were deputy sheriffs of Calcasieu Parish.* Rideau's counsel had requested that these jurors be excused for cause, having exhausted all of their peremptory challenges, *but these challenges for cause had been denied by the trial judge.*" 373 U.S. 723-25. (Emphasis supplied.)

Mr. Justice Stewart, after observing that "the plan [the filming of the confession and its telecast] was carried out with the active cooperation and participation of the local law enforcement officers," concluded that "without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury, . . . due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.' "

We are of the opinion that neither *Irvin* nor *Rideau* support a holding that the jurors' testimony had to be rejected by the trial judge and that a fair jury could not possibly have been obtained in this case.

In *Irvin*, the Court was dealing with a case where eight of the twelve jurors thought the defendant guilty, some of them stating that evidence would be needed to overcome this belief. The basic thrust of the Court's holding is found in its conclusion that "it would be difficult to say that each [of the eight opinionated jurors] could exclude this preconception of guilt from his deliberations." It was only against this background that the Court ruled that the trial court should have rejected the jurors' statements that they could render an impartial verdict despite their opinions. These vitiating opinions, moreover, were formed on the basis of publicity not only of Irvin's criminal record, but of statements that he had actually confessed to several

murders, including the one for which he was convicted. In the present case, the publicity contained accusation only by innuendo. So far as *Irvin* is concerned, indeed, it would seem that Dr. Sheppard was accorded rather more than the constitution requires, for each of the twelve jurors who voted to convict him testified they were entirely free of any opinion as to his guilt or innocence. The Court in *Irvin,* by way of contrast, ruled that

> "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to estabish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

Irvin, we think, provides no basis for ruling that the publicity in the present case was such as to "rebut the presumption of a prospective juror's impartiality."

The facts of *Rideau* set it even further apart from Dr. Sheppard's case. To ask three jurors to put entirely aside the visual spectacle of a confession by the very defendant they are charged to presume innocent is indeed close to demanding the impossible. To believe that the balance of that jury could remain ignorant of what their fellow jurors knew would be folly. It was far different, and we think not unreasonable, to ask a jury to ignore the suspicions and accusations of the press in deliberating Dr. Sheppard's guilt or innocence. Compare *Bearden* v. *United States,* 320 F(2) 99, 101-103 (CA 5, 1963), *cert. denied,* 376 U.S. 922 (1964).

While it was not expressly relied upon by the District Court, we believe that the decision in *United States ex rel. Bloeth* v. *Denno,* 313 F(2) 364 (CA 2, 1963), *cert. denied,* 372 U.S. 978 (1963) is distinguishable upon the same grounds as *Irvin and Rideau.*

Other cases relied upon by the District Court, *Delaney* v. *United States,* 199 F(2) 107 (CA 1, 1952); *Marshall* v. *United States,* 360 U.S. 310 (1959); *United States* v. *Accardo,* 298 F(2) 133 (CA 7, 1962); *Krogmann* v. *United States,* 225 F(2) 220 (CA 6, 1955), are all immediately distinguishable as cases involving the exercise by federal appellate courts of their *supervisory power* over trials in the district courts. But they are further distinguishable on their facts. In *Delaney* the pretrial publicity about an accused Collector of Internal Revenue, Delaney, included extensive coverage of public hearings before a congressional subcommittee investigating his alleged criminality and misfeasance which the court said "afforded the public a preview of the prosecution's case against Delaney," without the safeguards of a trial. It included evidence of Delaney's bankruptcy, charges of larceny and embezzlement, and a public announcement by the committee chairman referring to the "deplorable activities of . . . Mr. Delaney" and the committee's effort to find out "why this betrayal has occurred." The court further emphasized that the federal government, prosecutor in the criminal case, was itself responsible for much of the publicity. In *Marshall,* publicity appeared during the trial which included information of alleged previous felony convictions involving forgery, of previous violation of the drug laws, and of an identification of Marshall as one who had prescribed restricted drugs "for Hank Williams before the country singer's death." The defendant did not take the stand, but all of the above was admittedly communicated to several members of the jury through news accounts. The Supreme Court was careful to point out that reversal was "in the exercise of our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts. . . ." In *Accardo* the accused did not take the stand, but the newspapers published accounts of

his criminal record and other inflammatory material comparing Accardo with Capone and calling him "the master of muscling legitimate business." Also the court found inadequate the district judge's admonitions to the jury to avoid all news accounts of the case. In *Krogmann* the offending publicity erroneously asserted that one of the defendants had admitted the offense charged during his trial testimony and this Court, exercising its supervisory power, found error in the trial judge's handling of the matter after discovering that two of the jurors had read the accounts. Our review of these last considered cases leaves us unconvinced of their importance to the issue before us.

We have emphasized above that the publicity involved in the present case was not of a nature calculated to inspire confidence in the objectivity and good taste of the public news media. But neither was it of a nature calculated to create lasting opinions as to Dr. Sheppard's guilt. Surmise, conjecture, and accusation were substituted for confession, criminal record, or direct evidence. We are not prepared now to hold that American citizens have so far forgotten their traditional heritage of "fair play" that such shabby reporting would irretrievably infect the minds of an entire metropolitan community. Our jury system cannot survive if it is now proper to *presume* that jurors, selected with the care taken in this case, are without the intelligence, courage and integrity necessary to their obedience to the law's command that they ignore the kind of publicity here involved. We are left rather in the position of the Court in *Beck* v. *Washington*, 369 U.S. 541, 557 (1962), where "we cannot say the pretrial publicity was so intensive and extensive or the examination of the entire panel revealed such prejudice that a court could not believe the answers of the jurors and would be compelled to find bias or preformed opinion as a matter of law."

Our negative holding that Dr. Sheppard has not demonstrated an adequate basis in the pretrial publicity for disregarding the jurors' assertions of impartiality would be sufficient to dispose of this aspect of his petition. We prefer, however, to emphasize the affirmative reasons for refusing to ignore those assertions. Federal courts frequently employ the very tactic here employed by Judge Blythin, postponing their rulings on motions for change of venue until an attempt to impanel a jury has revealed whether it is possible to find impartial jurors. *E.g., Hoffa* v. *Gray*, 323 F(2) 178, 180 (CA 6, 1963), *cert. denied*, 375 U.S. 907 (1963); *Blumenfield v. United States*, 284 F(2) 46, 51 (CA 8, 1960), *cert. denied*, 365 U.S. 812 (1961); *United States* v. *Kline*, 205 F. Supp. 637, 638 (D. Minn. 1962); *United States* v. *Hoffa*, 156 F.Supp. 495, 499 (S.D. N.Y. 1957); *United States* v. *Dioguardi*, 20 F.R.D. 33, 36 (S.D. N.Y. 1956); *United States* v. *Dioguardi*, 147 F.Supp. 421, 422 (S.D. N.Y. 1956). The trial judge in such a situation is in the best position to evaluate the testimony of prospective jurors, and accordingly it is he who must bear the brunt of determining whether a fair trial is possible. *Wolfe* v. *Nash*, 313 F(2) 393, 397 (CA 8, 1963), *cert. denied*, 374 U.S. 817 (1963); *Mayo* v. *Blackburn*, 250 F(2) 645 (CA 5, 1957), *cert. denied*, 356 U.S. 938 (1958); *United States* v. *Bardo*, 244 F(2) 833, 838 (CA 2, 1957), *cert. denied*, 355 U.S. 844 (1957). As stated by the court in the *Mayo* case,

> "Whether the adverse publicity prevented the appellee from securing a fair trial was a question primarily addressed to the judgment of the trial court. . . . It properly accorded weight to the examination of the jurors on voir dire and to the lack of difficulty in choosing a jury. . . . It was on the ground at the time of trial; it saw and heard the voire dire examination of the jurors; it was in much better position to know

> the local sentiment and to hear and decide the motion for change of venue than was the federal district court." 250 F(2) 648.

After the jury had been selected and before the examination of prospective alternate jurors, Judge Blythin again overruled the motions for change of venue or a continuance, stating that

> "the best evidence in the world is the effort to select a jury, and what we get here in a picture that has taken almost two weeks of time. The Court is thoroughly satisfied that we have here a fair and impartial group of people to try this case, and I doubt if under any conditions at any time anywhere in this state you could have a better looking group of people and a more intelligent group of people, as a whole, to try a case of this kind, and the Court is thoroughly satisfied that they are a group of fair and impartial people who can properly try this case under the guidance of the Court, and I hope we will be able to give them that in the manner that it ought to be given."

Our examination of the entire record leaves us convinced that there is no basis for rejecting this considered judgment by the one judge most qualified to make it.

Pretrial publicity is not the only focus of the District Court's ruling that the news media deprived Dr. Sheppard of a fair trial. The widespread publicity surrounding the trial itself is also summarized in the opinion below, outlining articles which for the most part involve reporters' recitation of evidence given and events occurring at the trial. One article reported that a prospective witness would testify that Marilyn Sheppard had referred to her husband as a "Dr. Jekyll and Mr. Hyde." This witness did testify, but did not disclose such an incident. Aside from

this article, it is not claimed that however colorful, the accounts of the trial were substantially inaccurate.

We feel no need to expand on the nature of this trial publicity, for petitioner's claim of constitutional error on this account is controlled by considerations rather different from those we have just explored. Varying degrees of exposure to the pretrial publicity were admitted by the jurors on voire dire, but with the single exception of the Winchell broadcast noted below there is no specific showing that any of the jurors had any contact with the trial publicity.

Petitioner emphasizes one article appearing during the trial entitled "But who will speak for Marilyn?" Whether we borrow the Ohio Attorney General's words and characterize this effort at impassioned prose as "inane and innocuous" reporting, or as the author's amateurish reach for immortality, we have more confidence in American jurors than to believe they would be made faithless to their oaths by reading it, *if in fact any of them did.*

Our own review of the record in this case discloses that the trial judge, from the beginning of the trial to its end, repeatedly employed traditional admonitions to the jury reminding them of their duty and oath to hear and try the case before them solely upon the evidence adduced in the courtroom. Because of its thoroughness, we set out in full an early charge to the whole jury:

> "And will you, ladies and gentlemen, be kind enough again to observe the caution which the Court has heretofore expressed to you? And I will repeat it again for the benefit of the two new jurors who have come, alternate jurors who have come into the picture.
>
> "You are not to talk about this case to anyone. You are not to permit anyone to talk about it to you. You are not to remain anywhere where other people are

talking about it among themselves. You are not to talk about it among yourselves, in your jury room or elsewhere.

"It is your duty as an individual juror and responsible citizen to keep your own counsel, to listen to the evidence that comes from the witness stand and the instructions of the Court as to the law and wait until all those are complete before you form any opinion or judgment whatever as to the outcome of this case, which opinions and judgments are to be expressed only in your jury room after the case has been finally submitted to you for deliberation and decision.

"I would suggest to you, too, and this is particularly directed to those who have come in today, that you do not during the pendency of the trial listen to comments about it over the radio or otherwise and do not read newspapers. Have somebody preserve those for you, and you can read them—that is, as far as this case is concerned—have the reports of this case taken out and have them preserved for you, and you may read them to your heart's content after this case is disposed of. I say that because I think you will feel better and you will be better.

"Mr. Corrigan [Chief defense counsel]: May I have the Court state to the jury that they will know more about this case than what will appear in the newspapers?

"The Court: Yes, indeed. You understand, ladies and gentlemen, the entire community has had through news media of this kind, that kind and the other, and discussion by people who really know nothing whatever about the case, probably, and there have been all kinds of things floating around, there is no dispute

about that anywhere, but you will get here the only facts that you are to consider in the determination of this case. They will be presented by the State, and then the defense will have its opportunity to present its views, if there are views to be then presented, and let us be sure that we are relying on what we hear from official authoritative sources and rely on those entirely in our consideration and decision of this case. Let's forget all about what has been floating in the community. We are now to the serious business of ourselves determining what the facts really are, and we will get that from this witness stand and on the basis of the rules of law that the Court will give you.

"Without any formality—does that cover what you wanted?

"Mr. Garmone [Defense counsel]: Yes.

"The Court: Does that cover what you wanted?

"Mr. Corrigan: Yes that's what I wanted covered, your Honor. Thank you."

Abbreviated repetitions of this admonition were made throughout the trial whenever the jury recessed, usually in the form of the statement that they were to remember the court's admonition and refrain from discussing the case, even among themselves. We find no instances where defense counsel expressed dissatisfaction with the adequacy, style or frequency of the court's admonitions in this regard. Neither does present counsel point to any such insufficiency.[7] Protest was voiced only when the court

[7] The dissenting opinion in this case, however, now characterizes such admonitions as "equivocal and inadequate," and also as "infrequent and equivocal." It has not been pointed out to us that in any of the many attacks on the Sheppard conviction have his able and aggressive counsel ever made such a charge. We are satisfied that the jury readily understood the judge's admonitions and that the dissent's charge of "equivocation" is not justified.

refused to interrogate the jury as to the Considine broadcast discussed below, and when it refused the motions for mistrial.

The District Court has here presumed prejudice from the publicity accorded Dr. Sheppard's trial. We believe that the presumption should be to the contrary, that the jury is assumed to have obeyed the instructions to avoid all contact with publicity concerning the case before them until some contrary showing has been made. *E.g., Estes* v. *United States,* 335 F(2) 609, 615 (CA 5, 1964), *cert. denied,* 379 U.S. 964 (1965); *United States* v. *Agueci,* 310 F(2) 817 (CA 2, 1962), *cert. denied,* 372 U.S. 959 (1963); *Rizzo* v. *United States,* 304 F(2) 810, 815 (CA 8, 1962), *cert. denied sub nom. Nafie* v. *United States,* 371 U.S. 890 (1962); *Cohen* v. *United States,* 297 F(2) 760, 764 (CA 9, 1962), *cert. denied,* 369 U.S. 865 (1962); *Holmes* v. *United States,* 284 F(2) 716, 718 (CA 4, 1960). The rationale for this presumption was stated in somewhat different words by Mr. Justice Holmes more than a half-century ago: "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day." *Holt* v. *United States,* 218 U.S. 245, 251, 54 L. Ed. 1021, 1029 (1910).

The presumption that obedient to instructions, the jurors ignored publicity during the trial has not been overcome by petitioner. The only showing that any of them encountered any of this publicity came when the trial judge questioned the jurors about a Winchell broadcast during the trial attributing marital infidelity to Dr. Sheppard. Two jurors advised that they had heard the broadcast, but would not be influenced by it, and an appropriate admonition on the subject was given by the judge. Defense counsel also requested interrogation of the jury as to their knowledge of another broadcast in which one Considine

made remarks derogatory to Dr. Sheppard. The trial judge refused this request, observing that he did not think the jury should be harassed with interrogation each morning. We believe that this action was itself within the discretion of the judge, and that it may indeed have been the best thing to do. A discreet judge might well conclude that repetitive reference and inquiry as to matter prejudicial to the defense would harm rather than help. A substantial number of lawyers skilled in the art of advocacy would, we think, agree. Compare *Estes* v. *United States*, 335 F(2) 609, 615 (CA 5, 1964), *cert. denied*, 379 U.S. 964 (1965); *United States* v. *Provenzano*, 334 F(2) 678, 696 (CA 3, 1964), *cert. denied*, 379 U.S. 947 (1964); *Ford* v. *United States*, 233 F(2) 56, 61-62 (CA 5, 1956), *cert. denied*, 352 U.S. 833, 1 L. Ed. (2) 53 (1956). In any event, any effect that this limitation of interrogation during trial might be thought to have is dissipated by the opportunity accorded defense counsel to interrogate jurors on their motion for a new trial. Three of the jurors were thus questioned, but counsel did not see fit to inquire into possible contacts with trial publicity.

On the basis of the record now before us, we can only guess whether the jurors violated the instructions to avoid publicity about the trial in any significant degree. In view of the presumption that such instructions were obeyed, we must hold that petitioner has failed to carry the burden of demonstrating a denial of due process in the trial publicity.

The District Judge also concluded that news coverage of the trial deprived petitioner of his constitutional rights because it contributed to a "carnival atmosphere." Stress is laid on the manner in which the trial judge allocated the seating available in his small courtroom, giving most of it to the press and installing special tables for them. Now, with the reflection and the hindsight that an interval of

ten years has provided, and after all of the appellate tribunals have found the judge's conduct in this regard without constitutional fault, it is asserted that the trial judge should have done a better job. We are not told what alternative measures he should have adopted. Certainly he was without power to slake the public interest. Should he then have selected news representatives who would be regularly favored with admission to the courtroom, and let each day's trial begin with a scramble by the unfavored to gain access? Should he have moved the trial out of the courtroom into some public hall or auditorium where the public and the press could be accommodated at a greater distance from the jury and counsel? Shall we now speculate whether such planning would have reduced or augmented the so-called "carnival atmosphere?" It is asserted also that too many photographs were taken of the jury, the defendant, and counsel. No photographs were allowed to be taken in the courtroom while the court was in session. In view of today's increasing dissatisfaction with the aggressive performance of many of the news media, it may indeed be regretted that the trial judge did not enforce more rigid discipline of its representatives. But we can no more find impropriety of constitutional magnitude in what occurred than could the other appellate courts that have been challenged to do so.

The claim that the trial judge contributed to a "carnival atmosphere" is further supported by emphasis on the installation in the courtroom of a microphone and loud speakers. This is surprising in view of the fact that it has become regular practice to install such electronic equipment in modern courtrooms, including those occupied by the United States District Courts. We find no merit in this claim.

The opinion of the District Court additionally criticizes activities of the press as follows:

> "The Court need not be naive, and it does not stretch its imagination to recognize that one of the purposes of photographing the jurors so often was to be assured that they would look for their photographs in the newspapers and thereby expose themselves to the prejudicial reporting. Also, the newspapers ran editorials praising the trial judge (he was a candidate for re-election) and published photographs and sketches of him in at least 46 separate issues. *This was certainly an attempt to bring him around to their way of thinking.*" 231 F. Supp. 63. (Emphasis supplied.)

Even if we were to join in the apparently gratuitous inference as to the press' motives, we have just examined the reasons why we cannot join in the presumption that the jurors violated their oaths and instructions by examining the trial publicity.[8] Nor are we willing to assume the judicial venality or timidity we would have to assume to find any effect of such publicity on the judge in the face of a record which is entirely devoid of any evidence of trial misconduct on his part.

We ponder whether the flamboyant and sometimes shabby pretrial exhibitions of the press in this case would have had a greater tendency to predispose prospective jurors to an early suspicion of guilt of the accused than the news that a grand jury had indicted him followed by his arrest and being required to stand trial for murder. Are the procedures of our American courts, which we justly boast to be the fairest in the world, without power to seat an impartial jury notwithstanding its previous knowledge than an earlier jury of the accused's peers, a

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[8] The dissent mentions photographs taken of the home and family of juror Mancini while she was away at the trial. It should be noted that Mrs. Mancini was an alternate juror, discharged before the start of the jury's deliberations. This picture taking enterprise, however, does portray the brashness of some of today's news photographers.

grand jury, had by its indictment accused him of murder? We do not think so.

More fundamentally, we are struck by the difficulty some ten years after the trial of indulging in the proposed speculation that had it been held in some other county in Ohio, the interest of the press, the radio and T.V. would have subsided, or that the citizens of some rural county would be less interested in the colorful events involved than their brothers in the big city. Was the interest in the long ago Scopes trial less because it was held in a rural area of Tennessee? Had the trial judge here decided to postpone the trial a month, six months, or a year, would not fresh and more colorful cries of righteous indignation be heard from all of today's media of information? Whither in time or place should a court run to attempt to seat a jury completely disinfected of all news, and at the same time intelligent? Compare *Rees* v. *Peyton,* 341 F(2) 859, 863 (CA 4, 1965); *United States* v. *Cohn,* 230 F. Supp. 589, 590-91 (S.D. N.Y. 1964). Should a Federal Judge now speculate whether change of scene or postponement might have offered a way to administer some judicial catharsis to cleanse away all that prospective jurors might have seen, read, or heard about a matter of such interest as the killing of Mrs. Sheppard? We do not think that such speculative review of the trial judge's discretion should now be indulged in the context of this case.

Judge Blythin summed up his own estimate of the situation in the following language:

> "We can't control publicity, and I do not believe that you will ever end the publicity in this case until you end the trial of this case, and I think perhaps it is our duty to put that business in reverse and proceed on a business-like, fair, honest, legal basis to try the case and have it disposed of in the interest of the State and certainly it is in the interest of Sam Sheppard to

know whether a fair and impartial jury would declare him guilty or not guilty on the evidence which will be here produced. . . ."

We hold that petitioner failed to meet his burden of proving that the pretrial and trial publicity discussed above denied him due process of law or its equal protection.

2) *Disqualification of trial judge.*

The District Judge held that petitioner's constitutional rights were violated because the trial judge failed to recuse himself *sua sponte* from presiding at the Sheppard trial. The basis of this conclusion was some pretrial remarks which Judge Blythin is alleged to have made, indicating his belief that Sheppard was guilty. As in the case of the alleged prejudice of the jury, partiality and bias of the trial judge have been *presumed* without any proof that the trial judge did or said anything in the conduct of the trial that could be attributed to or which demonstrated prejudice against the petitioner.

The material from which this finding was made came to light after the instant petition for habaes corpus was filed. There was put in evidence a statement of a New York columnist, one Dorothy Kilgallen Kollmar, wherein she stated that at the beginning of the trial she was invited into the Chambers of Judge Blythin and there told of the judge's belief that petitioner was "guilty as hell. There is no question about it." The full account of this alleged and interesting interview is set out in the District Court's opinion, 231 F. Supp. 64-65.[9] No denial of this conduct was made because the only one who could have done so,

[9] No explanation was offered to the District Court as to why disclosure of this unusual conduct of a judge of unimpeached reputation awaited his death. The accusation of the columnist was not made before the District Judge. It was contained in a statement agreed to have the "status of a deposition" and also, by agreement of counsel, no oath was administered "since the integrity of the witness is not in dispute." She was not cross-examined.

Judge Blythin, had been long dead when he was thus accused. The District Judge seemed to believe that with Judge Blythin's voice stilled by death, this recitation of his statements became "uncontroverted evidence in this case and must be accepted as being true."

A similar charge was made against Judge Blythin by one Edward T. Murray, an employee in the office of the Clerk of the Common Pleas Court of Cuyahoga County at the time of the Sheppard trial. His statement was that during a discussion of the Sheppard case in July, 1954, prior to the trial, Judge Blythin remarked that "Sam Sheppard was as guilty as he was innocent." As in the case of the first discussed accusation, no corroboration or denial of the charge could be provided because the only identified witness to the occurrence, a lawyer by the name of Maher, had, like the accused judge, long since died and the accuser's memory failed him as to the identity of "three or four" other people present.[10]

We believe that the District Judge was under a misapprehension in assuming that because Judge Blythin could not answer the charges against him, such charges constituted "uncontroverted evidence" that Judge Blythin had made the statements attributed to him. There are many circumstances in which testimony need not be accepted even though formally uncontradicted. *E.g., Quock Ting* v. *United States,* 140 U.S. 417, 420-22, 35 L. Ed. 501, 502-03 (1891); *Scates* v. *Isthmian Lines, Inc.,* 319 F(2) 798, 799 (CA 9, 1963); *Ramos* v. *Matson Nav. Co.,* 316 F(2) 128, 132 (CA 9, 1963); *D'Orsay Equip. Co. v. United States Rubber Co.,* 302 F(2) 777, 779-80 (CA 1, 1962); *Powers*

[10] As in the case of Dorothy Kilgallen, Mr. Murray was not put under oath and gave no explanation of the long interval between the event and its disclosure. Neither did he explain why he could recall the identity of one witness, unavailable because of his death, but could not recollect the other witnesses who might be living and available.

v. *Continental Cas. Co.*, 301 F(2) 386, 388-89 (CA 8, 1962); *Wooley* v. *Great Atl. & Pac. Tea Co.*, 281 F(2) 78, 80 (CA 3, 1960); *Hasson* v. *C.I.R.*, 239 F(2) 778, 782 (CA 6, 1956); *Andrew Jergens Co.* v. *C.I.R.*, 125 F(2) 686, 689 (CA 6, 1942); *Goodyear Tire & Rubber Co.* v. *FTC*, 101 F(2) 620, 624 (CA 6, 1939), *cert. denied*, 308 U.S. 557, 84 L. Ed. 468 (1939); 8 Cyclopedia of Fed. Proc. § 26.98 (3d ed. 1951); 11 Id. § 47.161 (3d ed. 1963); 7 Wigmore, Evidence, § 2034, pp. 260-63 (3d ed. 1940). Manifold reasons for rejecting the "uncontroverted" statements adduced by petitioner exist in the present case. Whether offered to prove the matter asserted or merely the fact of assertion, testimony as to the uncorroborated oral statement of a deceased person is the weakest form of evidence, viewed with suspicion and subject to close scrutiny. "The courts consider with suspicion, or lend a reluctant ear to, statements as to what a deceased person may have said, especially when corroboration is lacking." 31A C.J.S. *Evidence*, § 266, p. 689. Such statements "are regarded as of comparatively little probative value. . . ." 20 Am. Jur. *Evidence*, § 1196, p. 1048, and ". . . courts of justice lend a very unwilling ear to statements of what dead men had said," *Lea* v. *Polk County Copper Co.*, 62 U.S. (21 How.) 493, 504, 16 L. Ed. 203, 207 (1859). Whether the habaes corpus factfinder be persuaded by the polite language of the Ohio Attorney General that "even the best of memories wane dim to some extent" or cared to find inherently incredible the stories told by Judge Blythin's accusers or be satisfied that they did not overcome the presumption of the regularity of the deceased trial judge's conduct, he was at liberty to withold his conviction of Judge Blythin in this regard. There is, moreover, much to contradict these "uncontroverted" statements, which are entirely inconsistent with several other remarks made by Judge Blythin. Thus, in denying renewed motions for change of venue or

continuance, he stated that it would be in Dr. Sheppard's interest to have a verdict rendered upon the evidence offered in court, "and the court has no idea whatever what that evidence will be. He hasn't even a thought as to the direction of it. He is fortunate in that respect, and he is very pleased about this situation." Again, in cautioning the jurors before a weekend recess to avoid all publicity about the case, he said that by avoiding such publicity "you will feel very much better as the trial proceeds, I am sure, and I have no idea what is going to develop in the trial any more than you do. . . . It is serious business, of course . . . we ought to be equally serious as the matter itself, and we should be sure that we are keeping ourselves as good citizens in the position where we can listen to that testimony without being influenced in any way, shape or manner by what may be surrounding in the air and which may have no basis in fact."

During the course of the trial, Judge Blythin cut off repetitious examination by defense counsel, and during the course of the ensuing discussion stated that "the Court thinks and believes, thoroughly believes, that he has been impartial from the beginning, and he will be to the end. The Court has no interest in this case other than to be sure that we do have a fair trial, and that we proceed with the trial." While overruling defense motions made at the close of the state's case, he made the following remarks:

> "Gentlemen, due to the tendency that always exists, among the laymen at least, to deem anything that the Court says about the evidence in a case, or about the remarks of counsel directed to that evidence, as some expression or at least suggestion that the Court has formed some opinion as to what the facts really are, of course, this case and in this connection at the moment the Court has no obligation whatever, nor even right, to even consider the weight of the facts

> in this case nor to express any opinion or, in fact, have any opinion as to the guilt or innocence of the defendant."

Perhaps most important, an affidavit by one of the original defense counsel filed in the present proceeding relates that when Judge Blythin was asked whether he would be influenced by the fact that his son had participated in investigating the crime, he stated that he would disqualify himself if defense counsel wished, and "he made himself very clear as to what his position was, and that he could sit and hear this case without having any prejudices." We find further evidence of his judicial discernment in Judge Blythin's valid defense of his court and himself in denying petitioner's motion for new trial,

> "It is to be noted that not a single person or agency connected with the investigation of, or prosecution for, the crime involved escapes the anathema of the defense. These include the police, the coroner, his assistants, the prosecuting attorney and his aides, the State's witnesses, the grand jury, its foreman, the trial jury, the public, the bailiffs *and the Court*. The sense of search for truth and the declaration of justice seem to have vanished from a whole community as if by magic and overnight. The news agencies of every kind and character are thrown in for good measure. *In spite of all the charges made not a single specific item is cited in support of the claims made.* Only broad generalities are indulged in. Reviewing courts will, we hope, have the duty of passing on all the legal questions involved and appearing on the record, and unless it is shown in very clear fashion that some extrinsic forces plowed through the effort to grant the defendant a fair trial, and succeeded in disrupting that effort, it is fair to assume that none did." (Emphasis supplied.)

The accuracy of the quoted statements by Judge Blythin, permanently recorded when made, are not subject to fallible human memory as are the dead-man "admissions" furnished by Murray and Mrs. Dorothy Kilgallen Kollmar. Certainly a factfinder could give them weight in resolving the issue.

Despite the foregoing, however, we do not feel that we need here rule that the District Judge's finding of fact was clearly erroneous within Fed. R. Civ. P. 52(a). Accepting his finding that Judge Blythin in fact made the statements attributed to him, we are not persuaded that petitioner has met his burden of proving deprivation of his constitutional rights in this regard. Absent some proof that an early impression of petitioner's guilt so infected Judge Blythin's judicial disposition as to impair his ability to provide petitioner a fair trial, we cannot join in the holding of the District Court. We find no authoritative disagreement with the text that "a judge is not disqualified to sit in a criminal case merely because he has an opinion as to the guilt of the accused, or is convinced of his guilt. . . ." 30A Am. Jur. *Judges*, § 172, p. 89, and that "In the absence of prejudice or bias, a judge is not disqualified by a declaration of his belief as to the guilt of a person charged with an offense before him. . . ." 48 C.J.S. *Judges*, § 89, p. 1078. Compare Hendrix v. Hand, 312 F(2) 147 (CA 10, 1962); *United States* v. *Shotwell Mfg. Co.*, 287 F(2) 667, 672 (CA 7, 1961), *aff'd*, 371 U.S. 341 (1963); *United States* v. *Mroz*, 136 F(2) 221, 224 n.4 (CA 7, 1943), *cert. dismissed*, 320 U.S. 805, 88 L. Ed. 487 (1943).

The only authorities cited by the District Judge for his finding of constitutional error in the failure of the trial judge to recuse himself, *State, ex rel. Pratt* v. *Weygrandt, Chief Justice*, 164 Ohio St. 463, 132 NE(2) 191 (1956); *Tumey* v. *Ohio*, 273 U.S. 510, 71 L. Ed. 749 (1927); *In re Murchison*, 349 U.S. 133, 99 L. Ed. 942

(1955), are completely inapposite. In the case at bar it was the jury and not the judge who determined the guilt or innocence of petitioner. *Pratt* v. *Weygandt* was a divorce case to be decided entirely by the trial judge, and mandamus to compel his replacement was refused. *McFadden* v. *United States,* 63 F(2) 111 (CA 7, 1933), not cited by the court below, is also distinguishable as involving a trial to the judge without a jury. Similarly, in *Tumey* v. *Ohio,* the United States Supreme Court held improper state provisions for trial of liquor law violations before a village mayor who was to retain the amount of his costs in each case of conviction, in addition to his salary. The Court said, "But no fees or costs in such cases are paid him except *by the defendant if convicted.* There is, therefore, no way by which the mayor may be paid for his service as judge, *if he does not convict* those who are brought before him. . . ." 273 U.S. 520, 71 L. Ed. 753. (Emphasis supplied.) The Court also noted that "all questions of judicial qualification may not involve constitutional validity. Thus matters of . . . personal bias . . . seem generally to be matters merely of legislative discretion." 273 U.S. 523, 71 L. Ed. 754. *In re Murchison* involved the Michigan "one-man grand jury" statute and the Supreme Court held that due process was denied where the judge presiding at a contempt hearing had also served as the "one-man grand jury" out of whose proceedings the contempt charges arose. The distinction between these cases and the case at bar is obvious.

It would come as no surprise to the legal profession and to an informed judiciary that there must be many times when a presiding judge exhibits impeccable fairness and discretion in his conduct of a criminal jury trial notwithstanding his own belief in the guilt of a defendant. What, for instance, of the position of the judge where a defendant withdraws a guilty plea? See *United States* v. *Kravitz,* 303

F(2) 700 (CA 3, 1962), *cert. denied*, 371 U.S. 922 (1962). Such fairness, indeed, is the mark of the kind of men we dare to think occupy judicial office. If no judge could preside at a criminal trial except one devoid of discernment, we would be hard put to find judges to handle our criminal dockets. We pridefully believe that by and large our judges are so conscious of their solemn duties as to protect meticulously the rights of an accused notwithstanding personal impressions of his guilt or innocence. Good judicial manners should of course suggest nondisclosure of such thoughts, but on the record before us we are unable to join in finding impropriety of constitutional magnitude. Certainly we cannot accept the District Judge's determination that such statements raise a presumption of constitutional unfairness and that having made such statements "the judge then has a personal interest in seeing that the defendant is convicted or the judge may well be embarrassed for having made such an emphatic statement of guilt." 231 F. Supp. 65-66. Upon what weak foundations would rest the judgments of our courts if long after the event they could be set aside by attributing to a judge misconduct not discoverable in the trial record, in circumstances where death forecloses any answer by the accused judge.

Much has been made of the fact that the Sheppard trial began on the eve of a judicial election at which the trial judge and one of the prosecution staff were candidates. We must assume that this emphasized to imply that desire for victory may have led the judge to conduct prejudicial to Dr. Sheppard's rights. We would have to entertain a low estimate of the integrity of our fellow judicial officers to join in any such inference. In most of the states of the Union it is traditional that those who occupy judicial office be required from time to time to account for their stewardship by submitting to election. If it is suggested that we presume that an elective judiciary can preserve

constitutional rights only at some undefined distance in time from election day, we reject such suggestion out of hand. As realists we know that those who seek reelection to judicial office hope that their conduct will find public approval, but we do not think that judicial *misconduct* would be more attractive to the electorate than conduct marked by the integrity which was as judges like to believe is possessed by elected judges as well as those who have the security of tenure during "good behavior." Nor are we prepared to presume that any judge is so far enamored of his position as to betray its responsibilities, no matter what he thinks would most please the electorate.[11] Additionally, it is not inappropriate to note that much of the publicity complained of, and the actual taking of testimony at Dr. Sheppard's trial, occurred *after* the election had been held. For like reasons, we must reject Dr. Sheppard's

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[11] The dissenting opinion refers to what is termed a "TV camera interview" of Judge Blythin with a former Scotland Yard officer and a "television program conducted on the steps of the courthouse, where . . . the trial judge had appeared." The basis for these charges is an unposed news photograph showing Judge Blythin approaching the door to the courthouse. The newspaper identification of the picture recited that the interview was being conducted "as Judge Edward Blythin breezed by." In denying the motion for new trial, Judge Blythin gave this account of the event:

"The court, on one morning, walked toward the courthouse steps, as usual, and there saw Robert Fabian (a retired Superintendent of Scotland Yard) with a very small contraption in his hand. Mr. Fabian said, 'Good morning, Judge Blythin, nice morning.' The court said 'Good morning, Mr. Fabian.' These are the very words, as near as the court can remember them, that passed. There was no conversation of any kind about the case on trial or any other subject."

The dissent also refers to a news photograph which is characterized as showing Judge Blythin "holding a press conference" during the jury's deliberations. However, this event is identified by the Cleveland Plain Dealer as follows: "Cornered by reporters, Common Pleas Judge Edward Blythin announced he was going to let the Sheppard murder jury continue to deliberate despite the record-breaking period it had been out."

We are unable to convict Judge Blythin of witting or unwitting misconduct from these events.

repetition in this Court of his broadside charge "that the elective judges of Ohio were so biased and prejudiced against him that he could not expect fair adjudication of his case in state courts. . . ."

3) *Lie detector evidence.*

Bay Village Mayor Houk, witness for the state, buttressed his veracity, over defense objection, by disclosing that he had submitted to a lie detector test. He was not allowed to give the results of the test. This was found not to have been reversible error by the Ohio appellate courts. *State* v. *Sheppard*, supra, 100 Ohio App. 345, 388, *aff'd*. *State* v. *Sheppard*, 165 Ohio St. 293. We are satisfied that no due process question is presented by this subject. Details of the Houk testimony are set forth in the District Court opinion wherein the District Judge indicates that, standing alone, the Houk affair might not be of constitutional stature.

In the pretrial press accounts, reference was frequently made to Dr. Sheppard's refusal to take a lie detector test. These same accounts also reported that he initially explained that his unwillingness to submit to the test arose from his then overwrought emotional state. He later assigned his continued refusal to the advice of his counsel and his family. Upon trial, two police officers gave evidence of his refusal to take the test. No objection was made to the testimony of the first officer, and the lie detector question was discussed thoroughly on direct, cross, redirect, and recross examination. Nor was there any objection when the second officer first referred to Dr. Sheppard's refusal to submit to such testing. The context of the first objection made—and the charge of constitutional error by the trial judge—is found in the following continuation of the second officer's account of Dr. Sheppard's voluntary communications to the police, which were made in the presence

of his counsel. We have partially reduced this excerpt to narrative form.

> When that tour was completed . . . we had some conversation with Dr. Sam and Mr. Petersilge and Mr. Corrigan. . . . I asked him if he could come into the office and make a statement in writing telling us the facts about the night of July 3rd. And it was agreed that I was to be called on the telephone nine o'clock Saturday morning, July 10th. Mr. Corrigan said he would call me about 9 a.m. . . . At about 8:20 or 8:25 A.M., July 10th Dr. Stephen Sheppard, Dr. Samuel Sheppard and Mr. Petersilge came into our office. He said he was prepared to make a statement. Then after being interviewed for an hour and a half, he was taken into our office on the fourth floor where he made a statement, which was typed. That statement has been offered into the evidence. State's Exhibit No. 48 is the statement that the defendant made at our office on the 10th. After the defendant made this statement in writing, the next time that I saw him was on July 12th. I saw him at his home, and spoke with him. Mr. Corrigan, Mr. Petersilge [Sheppard's counsel] his brother, Dr. Richard and Dr. Stephen were present. I again asked him if he had thought over the suggestion that I made that he try to eliminate himself as a suspect. He stated that he wanted to help us in every way possible to serve this crime—solve this crime. I asked him "Why don't you meet me some morning at some designated place at a designated time unbeknownst to anyone but yourself and myself and we will take this lie detector test, and at least you will eliminate yourself in one way?"
>
> "Q. Now, did you state to him as to where this test would be made?

"A. I said anywhere, regardless of where it might be, I would take him wherever he wanted to go.

"Q. And what did he say to that?

"Mr. Petersilge: Objection, your Honor. Now, the prosecutor keeps asking about whether Dr. Sheppard was willing to take a lie test, a lie detector test, and the Court of Appeals of this county has held that the results of a lie detector test are not admissible in evidence. It follows from that that it makes no difference whether Dr. Sheppard said that he would take the test or whether he refused to take the test.

"The Court: Well, he has answered the question. The Court will instruct the jury on the matter.

"Mr. Petersilge: Exception.

"Q. What did he say?

"A. He says, 'No,' he says, 'I'll be guided by the advice of my family and my attorneys.'

"The Court: Mr. Parrino, the Court would like to say a word to the jury now. Ladies and gentlemen of the jury, you are not to understand by these questions that any person is obligated to take any lie detector test. A person has his own choice. He is under no obligation whatever to take it. All right.

* * * * *

"Mr. Petersilge: Just a moment. If the Court please, we request the Court also to advise the jury that he not only has an option whether he will take it or not, but that the results of that test are not admissible in evidence.

"The Court: Well, they are not here, anyway, Mr. Petersilge.

"Mr. Mahon: We haven't any results here.

"The Court: They are not here.

"Mr. Mahon: We are not offering any results.

"Mr. Petersilge: That's right, but the reason should also be stated to the jury.

"The Court: I know, but we need not go beyond what we have in evidence. The evidence is here that he was asked to take it, he refused. Now, the Court tells the jury that he doesn't have to take it, period. We will stop right there.

"Q. Was there any further conversation there on the 12th?

"A. I said, 'Will you give me an answer on that in the very near future?' He says, 'I'll act only upon the advice of my family and my attorneys.' "

The statement, Exhibit 48, was Sheppard's voluntary exculpatory statement and his answers to the officer's suggestion of a lie detector test were given voluntarily in the presence of his attorneys. Despite the above objection, Dr. Sheppard when testifying in his own behalf on direct examination by his counsel, told about the first request that he submit to a lie detector test and stated that he told the officers he would be willing to submit to such examination "if it was a reliable test." The subject was alluded to by the prosecution and the defense in the closing arguments, again without objection.

Neither the District Judge nor counsel point to any decisions ruling unconstitutional the admission of testimony that a criminal defendant has refused to submit to a lie detector test. Authority for any such ruling must, we believe, be found in radiations from the Fifth Amendment, newly made applicable to state court proceedings by the decision in *Malloy* v. *Hogan*, 378 U.S. 1 (1964). *Cf. United States ex rel. Shott* v. *Tehan*, 337 F(2) 990 (CA 6, 1964); *Schiers* v. *California*, 333 F(2) 173, 176-77 (CA 9, 1964); *Helton* v. *United States*, 221 F(2) 338, 341 (CA 5, 1955); *Mezzatesta* v. *Anderson*, 227 F. Supp. 267, 271 (D. Del. 1964). For this reason, we believe it appropriate to note

also that defense counsel questioned Dr. Sheppard on his failure to invoke the privilege against self-incrimination at the coroner's inquest, and mentioned this failure in both opening and closing arguments to the jury.

The conduct of defense counsel regarding lie detector testimony has been discussed at length because we believe it spares us the need of determining the precise constitutional question suggested by the opinion of the District Court. Whatever the rule may be when prompt and appropriate objection is made, it is not a denial of due process for a trial court to withhold supervision of a seemingly deliberate withholding of objections by defense counsel or to allow a tardy change of strategy. It is significant that no motion to strike the extensive pre-objection testimony on this subject was ever made, that no written instruction on the subject was proffered at any time, and that no error was assigned on appeal because of what occurred in this regard. We think it would be a quite justifiable inference that for reasons sufficient to themselves, Dr. Sheppard's able and experienced trial counsel deliberately made an initial decision not to object to this evidence. We need not at this time try to probe the minds of such counsel to speculate as to what prompted their trial strategy. The passage quoted above demonstrates that they were aware of the rule rendering the results of lie detector tests inadmissible, and in their earlier objections to Mayor Houk's testimony they showed their awareness of the normal rule against testimony as to whether such a test has been taken. Ohio follows these rules. *State* v. *Smith*, 113 Ohio App. 461, 178 NE(2) 605 (1960). Sophisticated trial counsel will readily recall many occasions when they have deliberately withheld objection to inadmissible evidence and thereby served their client well. Varying reasons motivate such strategy. In this case, counsel may well have desired to obtain from the mouths of police officers the many exculpa-

tory statements made by Dr. Sheppard during the course of the investigation, particularly his original willingness to be tested by a lie detector, and to that end exhibited an attitude of willingness to let the officers talk. Their decision at long last to object to a particular answer which they then thought damaging to their theory that police hostility prompted the refusal did not shut out what had already been said on the subject. We agree that the trial judge could and should have given a better instruction to the jury, telling them that the results of a lie detector test would not be admissible and, *even though not requested to do so,* might well have gone further to say that no inference should be drawn from an accused's refusal to submit to such a test. His advice to the jury that they were "not to understand by these questions that any person is obligated to take any lie detector test. A person has his own choice. He is under no obligation whatever to take it," was, indeed, less than perfect. However, except for the on-the-spot request to tell the jury that "the results [of] that test are not admissible," no other instruction was requested, and the court did emphasize that no results of any test were available. We cannot find that the handling of this matter deprived the petitioner of any federally granted constitutional rights. If there was fault in what occurred, it was a nonconstitutional error which should have been assigned on appeal. Habeas corpus is not to be employed as a substitute for appeal. *E.g., Oyler* v. *Taylor,* 338 F(2) 260, 262 & n.3 (CA 10, 1964); *Allen* v. *Bannan,* 332 F(2) 399, 402 (CA 6, 1964); *Barker* v. *Ohio,* 328 F(2) 582, 584-85 (CA 6, 1964); *Worth* v. *Michigan,* 291 F(2) 621, 622 (CA 6, 1961), *cert. denied,* 368 U.S. 862 (1961); *Anderson* v. *Jones,* 281 F(2) 684, 686 (CA 6, 1960).

We think that the observations of the Seventh Circuit in *United States ex rel. Townsend* v. *Ogilvie,* 334 F(2) 837, 843-44 (1964) are pertinent here.

> "The [federal] court does not possess a residuum of power to search the record for procedural errors not involving constitutional rights and issue a writ of habeas corpus for the purpose of providing a new trial in the state court.
>
> "A federal court acting in this fashion would constitute a super appellate tribunal and encroach upon state appellate court prerogatives; such action would affront the principles of federalism upon which our federal-state juridic system operates."

At this distance, we cannot say that the decision of Dr. Sheppard's veteran counsel to withhold objection to the lie detector evidence prejudiced their client. It goes without saying that Dr. Sheppard's conviction does not prove such.

As proud as we are of the great traditions of our courts and their concern for the rights of those accused of crime, we are aware that like all human institutions they seldom act with perfection. It is not difficult, after ten years of searching analysis and contemplative study and the announcement of some new judicial attitudes, to find some imperfections in the conduct of a trial and to conclude that a judge or any attorney could have done a better job. But stability of the law and a nation's respect for its courts will disappear if, long after the event, their judgment may be set aside because a trial judge's discretion was less than perfectly exercised or because it is thought that the trial plan of defense counsel was not the best that could have been employed. This must be especially true where an accused has enjoyed adequate and full opportunity for appellate review.

4) *Misconduct of bailiffs in allowing Jurors to call their families.*

Ohio has a statute which provides for keeping a jury together from the time the cause is finally submitted until they agree upon a verdict. Overnight separation is permitted during adjournments of their deliberation. Ohio Revised Code § 2945.33 further provides that the officer in charge of the jury "shall not permit a communication to be made to them." As noted above, the Sheppard jury was not sequestered until the case was finally submitted. At that time, an entire floor of a hotel was set aside for occupancy by the jurors and the officers in charge of them. The telephones in each of the rooms occupied by the jurors were disconnected, but telephones in the officers' rooms remained in service. The stipulation of facts in the habeas corpus proceeding recites that during the days of their sequestration, but obviously not while they were actually engaged in their deliberations, various members of the jury were permitted to use the telephones in the bailiffs' rooms.

> "The calls were placed by the jurors. No records were kept as to the numbers called, the parties called, talked with, or the calling jurors. The bailiffs sat next to the phone as the conversations took place, but could only hear that half of the conversation made by the juror; what was said *to* the jurors could not be heard by the bailiffs. The Court was never asked for permission to allow the jurors to make these calls, and no permission was ever given."

While the District Court's opinion recites the foregoing stipulation, there was also before it the entire record of the Common Pleas Court, including the hearing on petitioner's motion for new trial and the investigation then made of the telephone calls. Not mentioned by the District Judge or by the dissenting opinion is the testimony of

bailiff Francis taken at the hearing on the motion for new trial, as follows:

"Q. Do you know, of your own knowledge, whether there was any telephone communications made out of any of the respective rooms that were occupied by any members of the jury?

"A. Their phones were cut out, Mr. Garmone.

"Q. And were there any telephone calls made from the room that you occupied?

"A. Yes, sir.

"Q. Did you make the calls, or did the jury make the calls?

"A. No. The jury made the calls, and I sat in the chair right alongside the telephone.

"Q. Mr. Bailiff, what was the purpose of the calls that the jurors made in your presence?

* * * * *

"A. Well, they were made to their husbands and wives, and those that had children, they talked to the children.

"Q. Was there any conversation whatsoever about this case or their deliberations?

"A. Not one word, Mr. Parrino."

The calls of the jurors were made the subject of an assignment of error on appeal, but the Supreme Court of Ohio refused to find cause for reversal in what happened. *State* v. *Sheppard,* 165 Ohio St. 293, 289-99. Upon this subject the court said:

"In situations such as those in the *Adams* and *Emmert cases,* it is easy to presume prejudice to the defendant as a result of the conduct of the bailiff. Can the same be said of the conduct of the bailiffs here in permitting jurors, who for several days and nights had been sequestered and unable to see or hear from their husbands, wives or children, to telephone those members

of their families? We do not think so. There is, on the contrary, every reason to believe that assurances of the health and welfare of their loved ones would tend to ease the jurors' minds as to personal matters and would make them better, more conscientious jurors. Time after time, the members of this jury were instructed by the court not to communicate with anyone concerning this case or permit anyone to communicate with them about it. We must assume they followed the court's instructions. No complaint is made that they disregarded these instructions every night for some seven weeks that they were allowed to go home at the close of each day's session of the trial. It is difficult to visualize a juror who will follow a court's instruction during the many hours he spends each evening and week end with his family and then deliberately disregard that instruction in a few brief moments he speaks to a member of his family on the telephone in the presence of a bailiff.

"The law of Ohio is that no judgment of conviction shall be reversed in any court for any cause unless it appears affirmatively from the record that the defendant was prejudiced thereby or was prevented from having a fair trial. Section 2945.83, Revised Code. There is no such affirmative showing of prejudice here, and this court will not presume a prejudice as a matter of law from the fact that some of the jurors made telephone calls to members of their immediate families."

The foregoing is not only the law of Ohio on this question but, in our view, is just plain common sense. Here again the District Judge placed reliance on cases the facts of which disclose their lack of resemblance to the case before him and us. *State* v. *Adams*, 141 Ohio St. 423, 48 NE (2)

861, 146 ALR 509 (1943); *Emmert* v. *State,* 127 Ohio St. 235, 187 NE 862, 90 ALR 242 (1933); and *Mattox* v. *United States,* 146 U.S. 140, 36 L. Ed. 917 (1892). In *State* v. *Adams,* a bailiff who had been told by the jury that it could not agree said to them, "you can't do that. You must reach a decision if you have to stay here for three months." In *Emmert* v. *State,* the officer in charge of the jury remarked to certain jurors, "My God, you are all wet. Judge Stahl expects you to return a verdict of guilty and if you don't it will be just too bad." Aside from this obvious inappositeness, these Ohio cases were found not controlling of this case by the Ohio Court. *Mattox* v. *United States* involved direct review of a federal trial. Because the dissenting opinion frequently cites *Mattox* to support its conclusions, we have set out in the margin Chief Justice Fuller's recital of the facts in *Mattox*[12] because it discloses a situation totally different from the facts of the

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[12] "In support of his motion for new trial the defendant offered the affidavits of two of the jurors that the bailiff who had charge of the jury in the case after the cause had been heard and submitted, 'and while they were deliberating of their verdict,' 'in the presence and hearing of the jurors or a part of them, speaking of the case, said: "After you fellows get through with this case it will be tried again down there. Thompson has poison in a bottle that them fellows tried to give him." And at another time, in the presence and hearing of said jury or a part of them, referring to the defendant, Clyde Mattox, said: "This is the third fellow he has killed."' The affidavit of another juror to the same effect in respect of the remark of the bailiff as to Thompson was also offered, and in addition, the affidavits of eight of the jurors, including the three just mentioned, 'that after said cause had been submitted to the jury, and while the jury were deliberating of their verdict and before they had agreed upon a verdict in the case, a certain newspaper printed and published in the city of Wichita, Kansas, known as The Wichita Daily Eagle, of the date of Thursday morning, October 8, 1891, was introduced into the jury room; that said paper contained a comment upon the case under consideration by said jury, and that said comment upon said case so under consideration by said jury, was read to the jury in their presence and hearing; that the comment so read to said jury is found upon the fifth page of said paper, and in the third column of said page, and is as follows:

present case. There the trial court refused to consider specific affidavits by jurors establishing highly prejudicial communications. Here defense counsel actually questioned three of the jurors on their motion for new trial, but no attempt was made to discover anything about the telephone calls, and no attempt was made to call the other jurors for such examination. Neglect of this opportunity to prove actual prejudice might itself be reason enough to deny relief in the absence of any present showing of actual prejudice, compare *United States* v. *Gersh,* 328 F(2) 460 (CA 2, 1964), *cert. denied sub nom. Mugnola* v. *United*

"'"*The Mattox case — The jury retired at noon yesterday and is still out.*

"'"The destiny of Cyde Mattox is now is [sic] the hands of the twelve citizens of Kansas composing the jury in this case. If he is not found guilty of murder he will be a lucky man, for the evidence against him was very strong, or at least appeared to be to an outsider. The case was given to the jury at noon yesterday, and it was expected that their deliberations would not last an hour before they would return a verdict. The hour passed and nine more of them with it, and still a verdict was not reached by 10:30 last night, when the jury adjourned and went to their rooms at the Carey. Col. Johnson, of Oklahoma City, defended him, and made an excellent speech in his behalf to the jury. Mr. Ady also made a fine speech and one that was full of argument and replete with the details of the crime committed as gathered from the statements of witnesses. The lawyers who were present and the court officers also agree that it was one of the best and most logical speeches Mr. Ady ever made in this court. It was so strong that the friends of Mattox gave up all hope of any result but conviction. Judge Riner's instructions to the jury were very clear and impartial, and required nearly half an hour for him to read them. When the jury filed out, Mattox seemed to be the most unconcerned man in the room. His mother was very pale and her face indicated that she had but very little hope. She is certainly deserving of a good deal of credit for she has stuck by her son, as only a mother can, through all his trials and difficulties, and this is not the first one by any means, for Clyde has been tried for his life once before. He is a youthful looking man of light build, a beardless face, and a nervous disposition. The crime for which he has just been tried is the killing of a colored man in Oklahoma City over two years ago. Nobody saw him do the killing and the evidence against him is purely circumstantial, but very strong, it is claimed, by those who heard all the testimony."'" 146 U.S. 142-144, 36 L. Ed. 918-19.

States, 377 U.S. 992 (1964). Going beyond this possibility, it is worthy of note that even on direct review of federal convictions where improper communications have been had with a juror, "it is well settled that what is prejudicial to a fair trial when the issue of 'juror misconduct' is raised, is a matter that must, to a large extent, be left to the discretion of a trial court and that an appellate court will not reverse the determination of that court on such an issue unless it is established as clearly erroneous." *Little* v. *United States,* 331 F(2) 287, 295 (CA 8, 1964), *cert. denied,* 379 U.S. 834 (1964). Several other cases establish that communications with jurors, even during their deliberations, do not necessarily void their verdict, *E.g., United States* v. *Kahaner,* 317 F(2) 459, 482-83 (CA 2, 1963), *cert. denied,* 375 U.S. 835, 836 (1963); *Steiner* v. *United States,* 229 F(2) 745, 748-49 (CA 9, 1956), *cert. denied,* 351 U.S. 953, 100 L. Ed. 1476 (1956); *Ryan* v. *United States,* 191 F(2) 779 (CA D.C. 1951), *cert. denied,* 342 U.S. 928, 96 L. Ed. 691 (1952); *Cavness* v. *United States,* 187 F(2) 719, 723 (CA 9, 1951), *cert. denied,* 341 U.S. 951, 95 L. Ed. 1374 (1951). The showing that communications were had with the jurors, accordingly, is not of itself enough to demonstrate a denial of due process. So in *Near* v. *Cunningham,* 313 F(2) 929, 933 (CA 4, 1963), the court ruled that "should it appear that prejudicial statements were made in the presence or hearing of the jurors," the habeas corpus court must reach its constitutional decision "in the light of all of the surrounding circumstances." Here there is no pretense at showing that prejudicial statements were made to the jurors by their children or spouses. The presumption that the jurors remained true to their instructions is fortified by petitioner's neglect of his opportunity to show that the jurors chose this particular opportunity among many to violate their instructions. In view of the absence of any

attempt to demonstrate or even claim such violations here we are satisfied that the Ohio Supreme Court correctly disposed of this issue, and that in any event the occurrence does not present a denial of constitutional due process.

The Supreme Court's recent decision in *Turner* v. *Louisiana*, 379 U.S. 466 (1965) does not affect decision of this question. The Court was there dealing with a conviction following three days' "continuous and intimate association" between the jury and two keys witnesses for the prosecuton, who were also deputy sheriffs. Dispensing with the requirement that *improper* communications be shown in such a situation cannot be related to the present situation, where we are shown only that some members of the jury made brief telephone calls to members of their families with whom they had, quite properly, been in continuous association throughout the trial.

5) *Other questions.*

Each of the "errors" discussed above was found by the District Judge to constitute a deprivation of due process, but he concluded his opinion with the observation that when taken together they reduced the trial to a "mockery of justice." Without further discussion, we are unable to attribute to a combination of these several claims a constitutional potency they lack individually. We have rejected the claims based on publicity, alleged bias of the trial judge, and communications with the jurors because no showing has been made that anything improper in fact occurred; we are no more willing to presume infirmity when these claims and the matter of the lie detector evidence are listed together than when they are considered separately.

Petitioner's brief to this court suggests that if we find the reasons given by the District Judge insufficient for granting the writ "such action would require a remand for further factual determination of the remaining points."

Counsel urges, in the alternative, that we pass upon these remaining points not relied on by the District Judge, and as to them petitioner "will stand upon the argument addressed to them in the Brief for Petitioner in the District Court." Without passing upon the procedural propriety of these suggestions, we consider that the case made in the District Court is before us and we have considered and found without merit the other claims of constitutional vice in the judgment convicting Dr. Sheppard.

One further subject should be briefly mentioned. Dr. Sheppard's petition claimed that the evidence at his trial was constitutionally insufficient to justify submitting the issue of guilt or innocence to the jury. This claim was neither withdrawn nor sustained upon the hearing in the District Court. On this subject, the petitioner's brief states,

> "The District Judge expressly declined to consider this issue . . . , although in all fairness it should be stated that counsel for petitioner-appellee on several occasions offered to waive this claim of error. . . . No waiver was required, however, *and the issue remains.* This Court no doubt has the power, since the trial transcript is before it as an exhibit from the District Court, to search the record and conclude that the allegation of insufficiency is well-taken." (Emphasis supplied.)

We construe this as a suggestion that we pass upon this point only if we find in his favor. Counsel continues as follows:

> "Appellee neither asks nor urges such relief, for he is ready, willing and anxious to stand retrial in any community not infected with an envenomed atmosphere, and a favorable ruling upon this issue would cause jeopardy to attach to the 1954 trial. This is not, however, to be taken as any concession that there was suf-

ficient evidence to constitutionally support a judgment of conviction in the first instance, for we vigorously contend that there was not. We simply do not press it at this time."

The Court of Appeals decision, affirmed by the Ohio Supreme Court, fully discussed the evidence and found it sufficient for submitting the issue of guilt to the jury. 100 Ohio App. 345. No claim is made here that that court's detailed recital of the evidence adduced at the trial is substantially erroneous. Without attempting to assess petitioner's actual guilt or innocence, this recital clearly establishes that Dr. Sheppard's conviction is not "so totally devoid of evidentiary support" as to constitute a denial of due process. *Garner* v. *Louisiana,* 368 U.S. 157, 163 (1961); *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960); *Hall* v. *Crouse,* 339 F(2) 316 (CA 10, 1964).

Petitioner apparently desires to save something for a further entry into or a rehearing in the District Court. We think that Ohio's appeal has brought the entire habeas corpus proceeding to us. We have passed upon it and do not find any basis for the release of Dr. Sheppard or the granting of a new trial.

Conclusion.

There is today no uncertainty that it is proper and, indeed, obligatory that Federal Courts see to it that no state shall convict or imprison anyone without that due process of law which the United States Constitution demands. This duty must be discharged, even at the risk of appearing arrogant in setting aside a judgment approved by all the courts of a particular state. In the context of the case before us, however, we will not be considered delinquent if we give proper respect to the carefully considered decisions of the Ohio courts and attribute to those courts power to discern and protect the constitutional rights of an accused at least approaching our own. Cer-

tainly the District Judge who heard this case gave to its study the labor, the conscientiousness, and the commendable concern for the accused's constitutional rights which we like to think are typical of our Federal judiciary. We fear, however, that this admirable zeal led him to go beyond permissible limits to find constitutional fault in what was done by the Ohio courts. The facts of this case do not add up to any of the situations in which the Supreme Court of the United States or any United States Court of Appeals has found it appropriate to strike down a judgment affirmed by the highest court of a state.

The order and judgment of the District Court is reversed with direction to discharge the writ and remand the petitioner to the custody of the respondent.

EDWARDS, Circuit Judge, dissenting. If ever flagrant and tolerated interference of news media in a criminal trial served to deprive a defendant of his constitutional rights to due process and a fair trial, this surely must be such a case.

The United States District Judge whose writ of habeas corpus we review declared this trial void and ordered the State of Ohio either to retry petitioner or set him free. By so doing, Judge Weinman did no more than fulfill his sworn obligation to uphold the Constitution of the United States. I would affirm.

The record which we review discloses a trial which fell far below minimum federal constitutional standards of due process.

The fundamental concept of a jury trial requires the protection of the jury from extra-judicial information about the case.[1] This doubtless can never be perfectly achieved in a trial of great public interest because of pretrial publicity.[2] But this fact serves as no excuse for fail-

[1] *Mattox* v. *United States*, 146 U.S. 140 (1892).
[2] *Irvin* v. *Dowd*, 366 U.S. 717, 722-723 (1961).

ure to employ all of the known and established measures for selection of an impartial jury and for the protection of that jury from outside influences during the trial itself.

This trial was held in a murder-shocked community in close proximity to the date of the crime in the midst of "unparalleled" publicity. (See *State* v. *Sheppard*, 165 Ohio St. 293, 294 (1956)) During the nine weeks of trial this jury was allowed to separate each night and weekend to their individual neighborhoods and homes. Such admonitions as the trial judge gave pertaining to news media during the first month of testimony were equivocal and inadequate.

During this trial there were constant extra-judicial contacts and communications with this jury. Many of these extra-judicial contacts and communications with the jury are clearly established by the record. As to others, Judge Weinman found that jury knowledge should be implied because of a factual record which impells me to the same conclusion.

A number of the most important and most prejudicial of the news media communications were drawn from sources completely outside of the trial record. These were not just news media inaccuracies or debatable comments in reporting court proceedings, they represented deliberate and highly prejudicial supplementation of the trial record.

Elaborate measures were provided for news media convenience in covering the trial. But the standard measures which could have been employed to prevent the news media from influencing the outcome of trial were not employed. In a trial atmosphere which the Supreme Court of Ohio described as "a Roman Holiday for the press," the news media were frequently allowed to become the dominant factor in a courtroom where defendant was on trial for his life. The judge who presided at this trial repeatedly professed his inability to control these events. In fairness it

should be noted that he was in the most difficult and vulnerable position possible to undertake to do so.

But at the outset it should be stated that it was not just abuse of freedom of the press which accounted for the violations of due process in this trial; it was failure of the judicial process also. This case provides no argument for repeal of the First Amendment or for immunization from prosecution of any person indicted for crime.

A judge assigned to try a controversial criminal case in the midst of great public excitement has the duty to guarantee due process of law. He also has the power to do so. Seven principal measures are available to him to protect the right to a fair trial of a person charged with crime.

1) On defendant's motion he can grant a change of venue to a distant locale in his same state which is less concerned with the crime. Ohio Rev. Code Ann. § 2311.38; *Rideau* v. *Louisiana,* 373 U.S. 723 (1963); *Irvin* v. *Dowd, supra.*

2) He can adjourn the trial, at least briefly, until a peak of public excitement (or a judicial election!) has passed. Ohio Rev. Code Ann. § 2945.02; *Rizzo* v. *United States,* 304 F.2d 810 (C.A. 8, 1962), *cert. denied,* 371 U.S. 890 (1962).

3) He can lock up the jury during trial so that it is guarded from outside contact. Ohio Rev. Code Ann. § 2945.31; *United States* v. *Holovachka,* 314 F.2d 345 (C.A. 7, 1963), *cert. denied,* 374 U.S. 809 (1963); *Baker* v. *Hudspeth,* 129 F.2d 779, (C.A. 10, 1942), *cert. denied,* 317 U.S. 681 (1942); *Stone* v. *United States,* 113 F.2d 70 (C.A. 6, 1940).

4) Absent these precautions he has increased responsibilities in screening the jury from extra-judicial influences. See *Turner* v. *Louisiana,* 379 U.S. 466 (1965).

He has the duty to prohibit news media contact with

the jury. *Mattox* v. *United States, supra.* He has the power to exclude photographers from his courtroom. Canon 35, American Bar Association, CANONS OF JUDICIAL ETHICS.[3] He has the power to warn the news media that if communications prejudicial to either side in the trial and not derived from in-court testimony are widely disseminated, that this may cause a mistrial. See *United States* v. *Accardo*, 298 F.2d 133 (C.A. 7, 1962).

5) He has the duty to *order* the jury not to read or listen to any newspaper, radio or television material bearing on the trial. *Coppedge* v. *United States*, 272 F.2d 504 (C.A. D.C., 1959); *Schoeneman* v. *United States*, 317 F.2d 173 (C.A. D.C., 1963); *Carter* v. *United States*, 252 F.2d 608 (C.A. D.C., 1958).

6) He has the duty if it is called to his attention that highly prejudicial material is widely disseminated in the open community wherein a jury is living at home, to inquire as to whether the jury has actually heard or read it; and if so, to determine whether prejudice resulted; and if so, to grant a new trial. *Krogmann* v. *United States*, 225 F.2d 220 (C.A. 6, 1955); *Marson* v. *United States*, 203 F.2d 904 (C.A. 6, 1953).

7) He has the duty to be particularly alert to guard the

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[3] "35. *Improper Publicizing of Court Proceedings.**

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

"Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization." *Adopted September 30, 1937; amended September 15, 1952.

jury against any outside communication during its deliberations or verdict, and if unauthorized communications are shown, prejudice is presumed, and absent effective rebuttal of such prejudice, he has the duty to grant a new trial. *Mattox* v. *United States, supra*; *Little* v. *United States*, 73 F.2d 861 (C.A. 10, 1934); *Wheaton* v. *United States*, 133 F.2d 522 (C.A. 8, 1943). See also Ohio Rev. Code Ann. § 2945.33; *State* v. *Adams*, 141 Ohio St. 423 (1943).

In this case it must be recorded that the trial judge made no effective use of any of these measures.

BACKGROUND FACTS[4]

What follows are the stark and undisputed facts shown by this total record—omitting for the moment the legal arguments pertaining to how and whether each possible issue has been properly raised, and omitting also the five trial events upon which I would affirm issuance of this writ.

This was a capital case.

Defendant was charged with first degree murder for the killing of his wife.

Defendant and his wife were last seen in their home about midnight, July 3, 1954, after a normal social evening.

Defendant first reported the murder at 6 a.m., July 4, 1954, asserting that he had been awakened by his wife's screams and had fought with and been knocked out by "an intruder."

The wife had been brutally murdered by 35 blows with an unidentified weapon.

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[4] This summary is drawn from a) the stipulated statement of facts presented to the United States District Judge and printed herewith as Appendix A. b) The transcript of the original trial (12 volumes and 7,099 pages) which was stipulated as an exhibit before the District Judge. c) Five scrapbooks of newspaper clippings which were likewise stipulated to as an exhibit before the District Judge.

Defendant bore visible signs of physical injury and there was medical evidence as to injury to his neck and head.

Defendant's account of the events had a vagueness about important matters which he attributed to the injuries and from which the prosecution later inferred guilt.

Defendant clearly had the opportunity to murder his wife on the night in question. No other suspect of apparent significance appeared in the case.

But the normal evidence of murder—identification, confession, motive, and murder weapon—were completely lacking at the beginning of the investigation.

As a result of the paucity of obvious proofs, there was no immediate arrest.

A newspaper campaign for a solution to the crime began and was pushed with incessant vigor by Cleveland's three newspapers—but in particular by The Cleveland Press.

There was widespread publicity given to a police suggestion that defendant take a lie detector test and to his refusal to do so.

Although publicly there had been no apparent cloud on the domestic horizon of the Sheppard family prior to the murder, The Cleveland Press disclosed an extramarital romance which defendant had with a former laboratory technician at the hospital with which he was affiliated.

The Cleveland Press in front page headlines, editorial and cartoons berated official slowness, demanded an inquest, condemned the "protection" of "the chief suspect," demanded the entrance of the Cleveland Police Department into the investigation, and demanded the arrest and the "grilling" of defendant at police headquarters.

The inquest, the investigation by the Cleveland Police Homicide Unit, and defendant's arrest and "grilling" followed hard on the heels of these demands.

Later, a representative of The Cleveland Press made the public boast that The Cleveland Press' handling of the Sheppard story produced the trial.

Six weeks after the murder, on August 17, 1954, defendant was indicted for first degree murder by a Grand Jury after presentation of the results of the Cleveland Police Homicide Unit's investigation.

The trial began October 17, 1954.

The Ohio Supreme Court described the setting for the trial thus:

> "Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. Special seating facilities for reporters and columnists representing local papers and all major news services were installed in the courtroom. Special rooms in the Criminal Courts Building were equipped for broadcasters and telecasters. In this atmosphere of a 'Roman Holiday' for the news media, Sam Sheppard stood trial for his life." *State* v. *Sheppard*, 165 Ohio St. 293,294 (1956).

The trial verdict came after nine weeks of trial and five full days of jury deliberation. The prosecution had asked for and insisted on a verdict of first degree murder. The defense had asked for and insisted upon a verdict of "not guilty." The jury returned a verdict of second degree murder.

THE TRIAL JUDGE AND THE PROSECUTOR

> "It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit."[5]

[5] Art. XXIX, Massachusetts Declaration of Rights (1780), 10 Anno. Laws of Massachusetts § 30, p. 32.

The trial judge's son was a detective who worked in the Homicide Unit of the Cleveland Police Department which secured defendant's indictment by the Grand Jury.[6]

As the trial opened on October 17, the trial judge was a candidate for re-election to the Common Pleas bench in an election scheduled for November 2, 1954.[6]

The assistant prosecuting attorney in charge of the state's case in defendant's trial was likewise a candidate for election to the Common Pleas Court of Ohio—Ohio's highest trial court.

The election occurred during the trial. Both the trial judge and the chief trial prosecutor were elected.

The trial judge and the trial prosecutor posed together for a newspaper picture congratulating each other on their mutual victories. The picture was printed in The Cleveland News on November 3, 1954. (See Appendix B).

As the trial resumed, defendant was being prosecuted by an elected judge, equal in all respects to the trial judge, except in the taking of the oath of office.

During the course of this trial, the trial judge's picture appeared in 46 issues of the Cleveland newspapers—including poses by him at the bench, reading a law book in chambers, in his shirt sleeves, pausing for a TV camera interview with Fabian of Scotland Yard on the steps of the courthouse (See Appendix C), and holding a press conference on the fourth day of jury deliberation on the verdict to announce his intention to keep them deliberating (See Appendix D).

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[6] Neither of these facts are relied upon by petitioner as constitutional violations. They plainly were known to petitioner's trial counsel. The first was discussed with the trial judge whose assurances of impartiality were accepted.

"The courtroom at these times is as sacrosanct as the cathedral, to be guarded against all raucous, impassioned, and foreign influence." [7]

News media interest in the case had increased as the trial date neared.

The names and addresses of all prospective jurors were published in the papers.

Extensive quotes from the *voir dire* examination of all prospective jurors were carried.

Every juror who ultimately was seated, except one, testified at *voir dire* to reading about the case in the Cleveland papers.

Every juror who was asked the specific question testified that a Cleveland newspaper was delivered daily to his or her home.

Seven of the twelve jurors who rendered the verdict were asked and did answer that they had one or more Cleveland papers delivered to their homes.

Five of the twelve jurors who rendered the verdict had The Cleveland Press delivered to their homes.

At the trial there were photographers inside the bar of Court immediately before the trial judge entered and immediately after the trial judge left the bench at any session where they desired to photograph the defendant, the jury, or the witnesses.

There was a table full of reporters and commentators within the bar of the court all through trial within one foot of the jury box.

All other seats in the courtroom, except those in the very last row, were assigned by the trial judge to news media representatives who were admitted on passes.

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[7] Justice William O. Douglas, *Public Trial and the Free Press*, 46 A.B.A.J. 840, 844 (Aug. 1960).

Half of the last row was assigned by the trial judge to the Sheppard family and half to Marilyn's family.

On the first day after it was sworn in, the jury was called back and posed in the jury box, with the pictures appearing in The Cleveland Press (See Appendix E).

On the same afternoon a reporter for The Cleveland Press was chosen as a representative of the press to accompany the jury on a tour of the Sheppard home.

On this same tour The Cleveland Press had a helicopter photographing the jury at the murder scene and subsequently published the photograph thus taken.

During the trial the jury's pictures, or those of one or more jurors, appeared in the newspapers 40 times (Cf. Appendix F).

These photographs included pictures of the jury, taken with the trial judge's permission, at lunch in the jury room (See Appendix G).

They also included repeated arranged photographs of the jury taken during the five days of their deliberations on the verdict. For one of such, see Appendix H.

There were also photographs taken during the trial in the home of the alternate juror (and printed in The Cleveland Press) picturing her husband, her mother, and her children (See Appendix I).

THE TRIAL RULINGS

> "The rules of courtroom conduct must be such as to remove it from the distractions and disturbances of the market place and to maintain as nearly as possible an atmosphere conducive to profound and undisturbed deliberation. . . . A court, in enforcing reasonable courtroom decorum, is preserving the constitutional and unalienable right of a litigant to a fair trial, and,

in preserving such right, the court does not interfere with the freedom of the press."[8]

As this trial opened the trial judge had ample warning from the pretrial events which we have recited as to the nature and aggressiveness of the publicity which might attend the trial.

The first matters before the Court on October 18, 1954, were defense motions for change of venue and continuance based on pretrial publicity and the trial arrangements for the news media. Defense counsel in reciting those arrangements pointed out "Even your Honor yourself, when you tried to mount the bench this morning, found your place occupied by a photographer taking pictures, and you had to remove him from the bench."

The following from one of the first day colloquies between Court and counsel vividly portrays the setting of this trial:

> "MR. CORRIGAN: If the Court please, I would like the record to show that inside the bar, as I stated before, is a table, and that that table extends over the width of the courtroom; that this courtroom is 26 by 48 feet; that the table runs east and west, and that the west end of the table is within six inches of the seat of the thirteenth juror and approximately two feet from the end of the jury box; that there has been assigned to that table representatives of the following news agencies:

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[8] *State* v. *Clifford*, 97 Ohio App. 1, 5-6 (1954), *aff'd.*, 162 Ohio St. 370 (1954), *cert. denied*, 349 U.S. 929 (1955). Ohio Appellate decision, April 14, 1954. Ohio Supreme Court decision, December 15, 1954. In these cases the Ohio Appellate Court upheld contempt convictions against three employees of The Cleveland Press for violating Judge Silbert's order against "picture taking while the court was in session."

Judge Silbert was a member of the same Common Pleas bench as the trial judge in the instant case.

"The Akron Beacon Journal; two seats for the International News Service; three seats for the Cleveland Press; three seats for the Cleveland News; three seats for the Cleveland Plain Dealer; two seats for the Associated Press; and a seat for the New York Journal American.

"That outside the rail or back of the rail in this courtroom, there are four rows of benches for spectators. That the first row of the spectators' benches have been assigned by the Court as follows, and are occupied by the following news services:

"Two seats to WGAR; two seats to WERE; one seat to WCUE; one to WTAM; two seats to WNBK; one seat to WDOK; one seat to WEWS; one seat to WHK; one to WXEL, all of these assignments being to representatives of broadcasting stations, radio stations or television stations, and one seat to the NEA, Newspaper Enterprise Association.

"That row two of the seats in the courtroom is assigned as follows:

"The Newark, New Jersey, News; the New York Post; the Pittsburgh Post Enterprise; two seats to the Cleveland News; two seats to the Cleveland Plain Dealer; two seats to the Cleveland Press, the Toledo Blade, the Pittsburgh Post-Gazette, the Lorain Journal, the Chicago Sun-Times, and the Scripps-Howard News Association.

"That the third row is assigned to WAKR; to the International News Service; the New York Journal American; Radio Station WSRS, Cleveland Heights; Detroit News; the New York News; two seats are assigned to Life Magazine; one to NBC and the St. Louis Post Dispatch.

"That the last—the only row of seats in the court-

room that is not assigned is the last row of the courtroom which accommodates about 14 people.

"We also wish to note in the record that there are in this courtroom three loud speakers and a microphone which stands in front of the witness chair.

"We incorporate all these things in the record before your Honor in the matter of our motion, both our motions, and we move at this time that the—I will change that.

"I state on information, on which I may be corrected if it is not so, that the seats that I have referred to were assigned by the Court, and that certain designations were put on the table and on the seats designatings the locations for these different organizations and newspapers that I have mentioned, and that that assignment was made by the Court on Wednesday of last week.

"Am I correct in that, your Honor?

"THE COURT: I beg pardon. I didn't get the last seat.

"MR. CORRIGAN: I say, I understand that these assignments whereby the courtroom is occupied as I have outlined was made by the Court on Wednesday of last week. Is that correct?

"THE COURT: Oh, no. That is not true. The Court will state as to what happened, also when you get through.

"MR. CORRIGAN: I noticed before we came to the courtroom that the three rows of seats back of the rail—there was posted on them a sign designating to whom they belonged, and that the signs designated these various radio stations and these various newspapers that I have mentioned, and that was done in advance of the trial. Is that correct?

"THE COURT: Yes, that's correct. The Court will state now for the record, also, that these arrangements that counsel has now referred to have all been had after a great deal of consideration, applications for space, but finally with the approval of the Court. There is no question about that at all. The arrangements as to the table for members of the local press in particular, and the national news services, were made sometime in the middle—perhaps Wednesday of last week, as counsel has indicated.

"Also, the next row, for the simple reason that those were set aside for local parties and the national news services, the second row in particular for the radio station representatives, and they selected the actual spaces within the—I mean the actual space for each individual within the total space, and they placed their tags on them so that each person will know where he sits.

"The others back of that were designated by the Court in the order of applications received for them.

"The back seat was kept for the members of the Sheppard family and the members of the late Mrs. Sheppard's family, and any other members of the public who will be admitted.

"The Court did that for the simple reason that the space is so very limited in the courtroom, and there is a request for space for far more people than can be accommodated at all.

"The Court will not during the progress of this trial permit any standees in the courtroom, and we are going to conduct this trial with that kind of decorum which befits a trial of any criminal case.

"As to the public address system within the courtroom, that was installed at the request of the Court because it is difficult to hear, particularly witnesses,

in the back of the courtroom, and it is very difficult at times for the jurors to hear witnesses. We are in a location where there is industry, light industry, it is true, a good deal of traffic, truck and other, and it is a place very difficult in which to hear at times.

"Let it be noted that this loud speaker—that these loud speakers are for the sole accommodation of the jurors, the members of the press and public in the rear of the courtroom, and especially for counsel at the trial table.

"There is no communication from inside the courtroom to any outside source, and all of these arrangements have been approved by the Court.

"Does that cover the——

"MR. CORRIGAN: Yes. If the Court please, I now move that the table be taken from inside the bar and removed from this courtroom; that the signs that have been placed on the three rows of spectators' benches be removed, and, as I understand, your Honor has issued cards, admission by cards.

"THE COURT: That's right.

"MR. CORRIGAN: And that the Court rescind the order whereby the only admission to this courtroom is by card issued by him. I so move.

"THE COURT: Overruled.

"MR. CORRIGAN: Exception.

"THE COURT: Now may we have the first juror?"

In addition to denying these motions the trial judge also denied a motion for continuance and took under advisement the motion for change of venue until an attempt to impanel a jury had been made.

On October 25 the trial judge denied defendant's motion for change of venue, holding that the jury impaneled demonstrated that a fair trial could be had in Cleveland.

On that same date the trial judge sent the jurors who

had been chosen to try this case home overnight—as he did for the subsequent weeks of this nine-week trial. (It should be pointed out that no motion to sequester the jury was ever made.)

On October 28, after impaneling twelve jurors, the trial judge finally denied the motion for change of venue.

On October 28 also, the trial judge gave the jury the basic "admonition" which he employed in this trial:

> "Ladies and gentlemen of the jury, now that you have been sworn as jurors for the trial of this case and you are about to leave this courtroom, the Court is going to do what the law of this state calls for and requires that he shall do. I have already stated to you what the law prescribes, and I will state it again in order that there be no misunderstanding whetever about it.
>
> "You are not to talk to anyone about this case or any matter in connection with it at any time during the progress of this trial. You are not to permit others to talk to you about it. You are not to remain anywhere where other people are talking about it among themselves, whether they have an interest in the case or not. You are not to discuss it among yourselves, either in your jury room or elsewhere.
>
> "It is the duty of a person who has been selected as a juror to sit here patiently and wait until all the evidence has been received and the instructions of the Court have been received and you are in your jury room for deliberation and decision before you discuss the matter in any manner, and in the meantime, you are individually to keep your own counsel and not to form any opinion or judgment whatever until the final step when you are in your jury room for deliberation and decision of this case.
>
> "Will you be good enough to observe that caution

during the progress of the trial? And I would suggest to you, as I have already done so—I don't know whether you were all here at that time or not—that you do not read the newspapers and you do not now listen to comments over the radio or by any other means until this case has been disposed of. Have somebody preserve those things for you until some future day when you will have lots of time to look them over.

"Now, without any formality at all, we will be adjourned until 9:15 tomorrow morning."

(It should be noted that the portion of the admonition which dealt with talking about the case, or allowing anyone to talk to them, was phrased in direct and commanding language. That portion of the admonition pertaining to news media employed the words "I would suggest to you."

Subsequent to October 28 a form of this "admonition" was given just four additional times up to the charge of the Court on December 17. On three of those occasions the word "suggest" was employed. Finally on December 3, the trial judge employed the somewhat more direct language, "Please do not read newspapers," etc.)

Thus by the 28th of October, basic judicial rulings on four of the major measures available to the trial judge to protect due process had been made.

On November 2, 1954, the trial was adjourned for election day. The trial judge was re-elected overwhelmingly.

On November 3 the jury as finally constituted was sworn in. The subsequent events of that day were recorded in the following colloquy on the morning of November 4:

"MR. CORRIGAN: If the Court please, I desire to renew my motion for a continuance of this case, for a change of venue, for the withdrawal of a juror and for a mistrial.

"(To the reporter): Would you read what I dictated yesterday?

"(Thereupon the following was read by the reporter, being taken at 11:00 o'clock a.m., Wednesday, November 3, 1954:

'After the jury was discharged at the end of the morning session, at the request of the newspapers, the jury was brought back into the room and sat in the room for a matter of—how long, 15 minutes, 10 minutes?

'Mr. Clifford: 10 minutes, yes.

'Mr. Corrigan: (Continuing) And were subjected to photography, photographing and television cameras by at least 10 cameramen who mounted themselves on chairs, the judge's bench and various parts of the room. This was all done out of the presence of defendant, Sam Sheppard.')

"MR. CORRIGAN: I also want to introduce, as part of my motion, Defendant's Exhibits 63, 64 and 65.

"(Defendant's Exhibits 63, 64 and 65 were marked for identification.)

"MR. CORRIGAN: When the jury visited the premises yesterday under the order of the Court, there was at least 40 reporters there, a great number of cameramen, and the Cleveland Press hired a helicopter which continued to swing over the house and take pictures with a great deal of noise and racket.

"When the jury went through the house, it was accompanied by a reporter of the Cleveland Press, Mr. Brady.

"So I renew all my motions at this time.

"THE COURT: They all be overruled, and exceptions noted."

(It should be noted that subsequent discussion developed that Brady's accompaniment of the jury at the Sheppard home had been with the trial judge's prior knowledge and

with the consent of the defense, which had been given by one of defendant's attorneys.)

Monday evening, November 22, the trial record shows still another objection to news media trial privileges, the rulings of the trial judge denying requested relief, and a cautioning of defendant's brother concerning trial publicity.

"MR. CORRIGAN: I desire to renew my motion for a chance of venue and a continuance of this case. Ever since we have started in this case, the halls and the rooms surrounding the Court House—or, surrounding the court room have been filled with reporters and photographers and television operators.

"The assignment room and the witness room have been occupied entirely by newspaper reporters, radio and television operators. On each morning the defendant has been brought into court at least 10 minutes before the beginning of the trial, and then for that period of time has been subjected by many photographers and television cameras, against his will, to be photographed.

"This morning—what is today?

"THE COURT: The 22nd.

"MR. CORRIGAN: November 22nd, there was erected in front of the Court House television cameras, WNBK. They were there when the jury was entering the Court House. The judge participated in being televised, as did Mr. Mahon and Mr. McArthur.

"We, therefore, renew the motions heretofore made, ask for the withdrawal of a juror and a continuance of the case.

"THE COURT: Of course, that will be overruled and exceptions noted.

"MR. CORRIGAN: Now, then, we request the court that the rights of the defendant be protected in this

court room, and that he be not compelled to submit to photographing and the television camera as he has been every morning with the knowledge of the court.

"We request that the Sheriff be ordered not to bring him into court until such time as the jury is seated.

"THE COURT: Well, that is more than one request. The court will make his position clear.

"First, there has been no photographing in the court room except upon strict orders of the court that it was to be done before court hours in the morning or after court hours in the evening and with the consent of counsel for the defendant.

"MR. CORRIGAN: I have given no consent to that.

"THE COURT: And let the record show that counsel for the defendant and the defendant, himself, have been voluntarily photographed in the court room from time to time during the progress of this trial.

"MR. CORRIGAN: I haven't been voluntarily photographed. Neither has the defendant. We have been compelled to be photographed. We can't escape it.

"THE COURT: Oh, no, I don't think that is so, Mr. Corrigan, and the court will say to you that the defendant is not to be photographed in the court room at all without your consent.

"MR. CORRIGAN: Well, if there has been any consent by anybody in this matter, the consent is withdrawn.

"THE COURT: All right. Now, as to the defendant being brought into the court room he is to be brought into the court room prior to the opening of the trial each day and just before the jury enters. That has been our effort since the beginning of this trial.

"Now, the Court wants to say a word. That he was told—he has not read anything about it at all—but he was informed that Dr. Steve Sheppard, who has

been granted the privilege of remaining in the court room during the trial, has been trying the case in the newspapers and making rather uncomplimentary comments about the testimony of the witnesses for the State.

"Let it be now understood that if Dr. Steve Sheppard wishes to use the newspapers to try his case while we are trying it here, he will be barred from remaining in the court room during the progress of the trial if he is to be a witness in the case.

"The Court appreciates he cannot deny Steve Sheppard the right of free speech, but he can deny him the right of the privilege of being in the court room, if he wants to avail himself of that method during the progress of the trial.

"MR. CORRIGAN: The statement of the Court about Steve Sheppard making uncomplimentary remarks about the testimony of witnesses is paralleled by the tremendous amount of publicity that is put in the Cleveland newspapers, especially headlines, since the beginning of this case, which has misrepresented entirely the testimony."

These motions for change of venue, continuance, and mistrial were renewed repeatedly thereafter (including the close of prosecution proofs and the close of defense proofs) and were similarly denied.

DUE PROCESS VIOLATIONS

"The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."[9] Justice Oliver Wendell Holmes.

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[9] *Patterson* v. *Colorado*, 205 U.S. 454, 462 (1907).

It is, of course, too late in legal history to doubt the power and the duty of a federal District Court to review on habeas corpus a state court conviction claimed to have been based upon violations of applicable federal constitutional commands. 28 U.S.C. § 2241; *Fay* v. *Noia*, 372 U.S. 391 (1963); *Townsend* v. *Sain*, 372 U.S. 293 (1963); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

It is likewise beyond challenge that the "due process" requirement of the Fourteenth Amendment[10] mandates state criminal court observance of minimum federal constitutional standards such as trial on a charge "fairly made and fairly tried in a public tribunal" before "an impartial judge," *In re Oliver*, 333 U.S. 257, 278 (1948); *Tumey* v. *Ohio*, 273 U.S. 510 (1927); *In re Murchison*, 349 U.S. 133 (1955); an "impartial jury" (if, as all do, the state elects a jury system), *Irvin* v. *Dowd*, *supra* at 721-722; *Rideau* v. *Louisiana*, *supra;* and a "verdict . . . based upon the evidence developed at the trial," *Turner* v. *Louisiana*, *supra* at 472. See also *Thompson* v. *Louisville*, 362 U.S. 199 (1960); *Garner* v. *Louisiana*, 368 U.S. 157 (1961).

In January of 1965 the United States Supreme Court said:

> "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. [See footnote.] 'The jury is an essential instrumentality—an appendage—of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law.' *Sinclair* v. *United States*, 279

[10] The Fourteenth Amendment to the United States Constitution provides in applicable part: ". . . nor shall any state deprive any person of life, liberty, or property without due process of law; . . ."

U.S. 749, 765. Mr. Justice Holmes stated no more than a truism when he observed that 'Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere.' *Frank* v. *Mangum*, 237 U.S. 309, at 349 (dissenting opinion).

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public court room where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel. . . ."

[Footnote] "The Sixth Amendment provides:
'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury of the State and district wherein the crime shall have been committed. . . .' (Emphasis supplied.)"

Turner v. *Louisiana*, *supra* at 472-473.

If ever a jury could be said to be likely to have been impregnated by the environing atmosphere," it was surely this jury. And I do not see how this Court can safely conclude that the jury verdict was based only on "the evidence developed against defendant . . . from the witness stand."

However applicable to this trial these standards may be, they are also generalizations. I would affirm the District Judge's writ in this case on the basis of specific due process violations which occurred during trial an for all of which there were both preventive measures beforehand and remedies afterward available to, but unused by, the trial judge.

At trial the principal issues upon which testimony was presented to the jury were 1) motive, 2) credibility, and 3) reputation. On each issue the evidence presented and

inferences argued by prosecution and defense were in sharp conflict. On each issue the jury could have believed either side.

But on these same crucial issues, as the trial progressed the news media supplemented the total record with material never heard in the courtroom. Much of this material though highly prejudicial to defendant, was relevant and admissible if a witness could have been found who was prepared to testify to it under oath in the courtroom and face cross-examination. Some material, though equally prejudicial, was obviously inadmissible under any circumstances.

The United States District Judge listed 30 different instances of objectionable news media communication which he felt were prejudicial. We shall discuss only five of these.

1. On Friday, November 19, 1954, a police officer of the Cleveland Police Department gave testimony during this trial which tended to contradict some portions of defendant's statements as made to the Cleveland Police.

On November 21, at 6:30 p.m., there was a radio broadcast which was heard in Cleveland over Station WHK in which Mr. Robert Considine made a comparison between defendant and Alger Hiss. Defendant's confrontation by Officer Shottke was compared to Alger Hiss' confrontation with Whittaker Chambers.

At the time in 1954, Alger Hiss' conviction was fresh in the national consciousness.

Robert Considine was one of the national commentators occupying reserved seats in the courtroom during this trial.

On November 22, at the commencing of court, defendant's counsel moved for a continuance of the trial, based on prejudice resulting from the Considine broadcast and asked the trial judge to question the jury as to whether they heard the broadcast.

The judge denied both motions, saying in part:

"Well, I don't know, we can't stop people in any event, listening to it. It is a matter of free speech, and the court can't control everybody.

"Mr. MAHON: I think that the court has instructed the jury that they are not to read about it or listen to the broadcasts. It was a general instruction that was given at the time the trial started.

"The COURT: We are not going to harass the jury every morning.

"MR. CORRIGAN: I can't help it, Judge. If you don't, that's all right with me. I make my exception.

"THE COURT: It is getting to the point where if we do it every morning, we are suspecting the jury. I have confidence in this jury, and we must have confidence or the jury system is of no value whatever to anybody."

Prior to dealing with this motion, the trial judge (as we have noted) had just denied a defense motion for continuance based upon a television program conducted on the steps of the courthouse the same morning, where among others, the prosecutor and the trial judge had appeared. The trial judge's picture at this appearance was published in one of the Cleveland papers on the day these motions were heard and denied (See Appendix C).

2. On November 24 The Cleveland Press published a front page eight-column headline: "Sam Called a 'Jekyll-Hyde' by Marilyn, Cousin to Testify." The first three paragraphs of the news story follow:

"Two days before her death, murdered Marilyn Reese Sheppard told friends that her accused husband, Dr. Samuel H. Sheppard, was 'a Dr. Jekyll and Mr. Hyde.'

"The prosecution has a 'bombshell witness' on tap who will testify to Dr. Sam's display of fiery temper—

countering the defense claim that the defendant is a gentle physician with an even disposition.

"One of Mrs. Sheppard's 'Dr. Jekyll and Mr. Hyde' statements was made to Bay Village Mayor J. Spencer Houk as recently as last June, The Press learned." (See Appendix J).

No such testimony was ever introduced at the trial.

Five of the jurors had testified that they received The Cleveland Press at their homes.

On November 26 defense counsel renewed his motions for change of venue and continuance and a mistrial, basing them on the Jekyll-Hyde story in The Cleveland Press, which he introduced as an exhibit (See Appendix J).

Defense Counsel also based his motions on a Thanksgiving Day edition of The Cleveland Press which contained pictures and interviews in the home of Mrs. Mancini—one of the jurors (See Appendix I).

The trial judge, without reference to the Jekyll-Hyde matter, overruled the motions, noting that Mrs. Mancini had not been home at the time of the interview and picture taking. He made no inquiry of the jurors as to either matter.

3. On December 5, Walter Winchell, in a nationwide broadcast heard and seen in Cleveland through WXEL television and WJW radio, stated that a Carol Beasley, who was under arrest in New York for robbery, had stated that she was defendant's mistress and had had a child by him.

On December 6 these facts were related to the trial judge who responded:

"THE COURT: Well, even, so, Mr. Corrigan, how are you ever going to prevent those things, in any event? I don't justify them at all. I think it is outrageous, but in a sense, it is outrageous even if there were no trial here. The trial has nothing to do with

it in the Court's mind, as far as its outrage is concerned, but—

"MR. CORRIGAN: I don't know what effect it had on the mind of any of these jurors, and I can't find out unless inquiry is made.

"THE COURT: How would you ever, in any jury, avoid that kind of a thing?"

At defense counsel's insistence the judge did query the jury as to whether any had heard the Walter Winchell broadcast the previous night. Two jurors responded that they had.

Thereupon the judge asked, "Would that have any effect on your judgment?" Each said, "No."

The trial judge accepted this inadequate assurance.[11] He did not reprove the two jurors for failing to heed his "suggestion" that they not listen to TV or radio. He did not order them or the rest of the jury not to do so again. He told the jury "to pay no attention whatever to that type of scavenging." He then proceeded with the trial.

4. On December 9, 1954, defendant took the witness stand.

During part of his direct testimony he testified to oral promises and oral abuse by various members of the Cleveland Police Department Homicide Bureau who interviewed him extensively after his arrest.

On December 11, the Cleveland News, printed a front page story under the headline "'Bare-Faced Liar,' Kerr says of Sam." The story quoted Captain David E. Kerr, head of the Homicide Bureau, to the same effect and adding:

"'If ever a person was handled with kid gloves, it was Dr. Sam,' said Kerr. 'In 800 homicide cases we have not had a single voice raised against our meth-

[11] Cf. *Coppedge* v. *United States*, *supra*.

ods, until this one from the Bay Village doctor.'" (See Appendix K).

Captain Kerr never appeared as a witness at the trial.

5. After the close of evidence and the arguments and the charge had been given, this jury was locked for its deliberations on verdict. These continued for five days and four nights. Subsequent to the rendering of the verdict it became known to the defense that the individual jurors had been permitted repeated phone calls to their homes. This knowledge was made the basis for a motion for new trial made by defense counsel.

The stipulation of facts agreed on by the parties before the United States District Judge gives the details on this issue:

> "After arguments and charge were complete, the jury was directed to retire to deliberate its verdict. They were placed in charge of two bailiffs, Edgar Francis and Simon Steenstra. The deliberations lasted for more than four days, during which time the jury was kept (except when at court deliberating) in the Carter Hotel in downtown Cleveland. They, together with the bailiffs, occupied the entire seventh floor of the hotel. Bailiff Steenstra had made arrangements whereby the telephones in the rooms occupied by the jurors were disconnected so that no calls could be placed or received.
>
> "The record does not indicate the times, the number of calls, or the identity of the juror-callers, but it is clear that both Steenstra and Francis permitted jurors to place outside calls from their (the bailiffs') rooms between the time the jury took the case (December 17, 1954) and the time the verdict was rendered (December 21, 1954). The calls were placed by the jurors. No records were kept as to the numbers called, the parties called, talked with, or the calling

jurors. The bailiffs sat next to the phone as the conversations took place, but could only hear that half of the conversation made by the juror; what was said *to* the jurors could not be heard by the bailiffs. The Court was never asked for permission to allow the jurors to make these calls, and no permission was ever given." (Emphasis in original)

THE UNITED STATES DISTRICT JUDGE'S HOLDINGS

Concerning the first four of the events we have cited (and others) Judge Weinman said:

> "[S]pecial note must be given to the attempt of the newspapers to influence the jury. It was startling to find photographs of the entire jury and of individual jurors (at times giving their home addresses) in no less than 40 issues of the Cleveland newspapers. The Court need not be naive, and it does not stretch its imagination to recognize that one of the purposes of photographing the jurors so often was to be assured that they would look for their photographs in the newspapers and thereby expose themselves to the prejudicial reporting." *Sheppard* v. *Maxwell*, 231 F. Supp. 37, 63 (1964).

> "It is clear beyond doubt, because of the sheer volume of publicity which attended the trial, that the jury read and heard about the case through the news media." (Footnote omitted.) *Sheppard* v. *Maxwell*, *supra* at 62.

Rule 52(a) of The Federal Rules of Civil Procedure states in part that "findings of fact shall not be set aside unless clearly erroneous. . . ." This rule is applicable to review of federal habeas corpus proceedings. *United States ex rel. Crump* v. *Sain*, 295 F.2d 699 (C.A. 7, 1961), *cert.*

denied, 369 U.S. 830 (1962); *Rushing* v. *Wilkinson*, 272 F.2d 633 (C.A. 5, 1960). See also Cases Annotated at n.57, 28 U.S.C.A. Rule 52.

In this trial all jurors, save one, freely admitted reading about the case before trial.

This jury was never locked up for the nine weeks of trial.

At least seven of the jurors took newspapers at their homes. Five of them took The Cleveland Press. The news media were given extraordinary prominence and privileges in the courtroom.

No admonition of an unequivocal nature concerning the jury not reading or listening to material about the trial was given until after a month of testimony.

The judge allowed himself and the jury all through the trial to be the constant subject of newspaper photography.

When queried on the one occasion when inquiry was allowed, two jurors testified to hearing the Walter Winchell broadcast.

They were not reproved nor were they or the other jurors told not to do it again.

The two newspaper stories were front page stories in newspapers of general circulation. The Cleveland Press "Jekyll-Hyde" story was topped by an eight-column double banner front page headline.

The two broadcasts were by nationally prominent commentators broadcasting on prime time in Cleveland.

With these facts before us, I do not see how we can say that the District Judge's holding is "clearly erroneous."

The District Judge's opinion in respect to these instances of prejudicial trial publicity is founded upon ample precedent.

Newspaper articles actually read by a juror or jurors which convey highly prejudicial information not admissible or admitted at trial have long been recognized as constituting such essential unfairness as to justify the

setting aside of the verdict and the granting of a new trial. *Mattox* v. *United States, supra; Krogmann* v. *United States, supra.*

Where flagrantly prejudicial newspaper articles are prominently printed in newspapers of general circulation during a trial wherein the jury is not sequestered, there is a presumption that some jurors have seen them and that defendant has been prejudiced thereby. *Harrison* v. *United States,* 200 Fed. 662 (C.A. 6, 1912); *Marson* v. *United States, supra; Krogmann* v. *United States, supra; Briggs* v. *United States,* 221 F.2d 636 (C.A. 6, 1955).

Unless this presumption of prejudice is overborne by careful inquiry of the jurors and, in appropriate cases, by strong admonitions to disregard, a motion for new trial should be granted. *Krogmann* v. *United States, supra; Marson* v. *United States, supra; Briggs* v. *United States, supra; United States* v. *Accardo, supra.*

As we have seen, the admonitions in this trial were infrequent and equivocal when given. And minimal inquiry was limited to the single instance of the Winchell broadcast.

In concurring in *Irvin* v. *Dowd,* Mr. Justice Frankfurter said:

> "Not a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts—too often, as in this case, with the prosecutor's collaboration—exerting pressures upon potential jurors before trial and even during the course of trial, thereby making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court. . . . For one reason or another this Court does not undertake to review all such envenomed state

prosecutions. But, again and again, such disregard of fundamental fairness is so flagrant that the Court is compelled, as it was only a week ago, to reverse a conviction in which prejudicial newspaper intrusion has poisoned the outcome. *Janko* v. *United States, ante,* p. 716; *see, e.g., Marshall* v. *United States,* 360 U.S. 310. See also *Stroble* v. *California,* 343 U.S. 181, 198 (dissenting opinion); *Shepherd* v. *Florida,* 341 U.S. 50 (concurring opinion)." *Irvin* v. *Dowd, supra* at 730 (concurring opinion.)

In my opinion "the disregard of fundamental fairness is so flagrant" in this case as to require the District Judge's writ.

On the fifth issue, pertaining to juror phone calls during jury deliberations, Judge Weinman found:

"This Court finds prejudicial error because the right to a fair and impartial trial as guaranteed by the due process clause of the Fourteenth Amendment includes the right to have a jury which is not permitted, after it begins its deliberations, to have unmonitored telephone conversations with third persons. As stated quite simply in *Mattox* v. *United States,* 146 U.S. 140, 150.

'Private communications, *possibly* prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least until their harmlessness is made to appear.' (Emphasis added.)

"There is nothing in the record to show the harmlessness of that part of the telephone conversations which the bailiffs could not hear. Accordingly, petitioner's constitutional rights were violated." *Sheppard* v. *Maxwell, supra* at 71.

Here too, the District Judge has sound precedent in support.

The federal courts (including the United States Supreme Court and this Court) have created and given effect to the presumption that any unauthorized communication with a juror is prejudicial absent effective rebuttal. *Mattox* v. *United States, supra; Stone* v. *United States, supra; Little* v. *United States, supra; Wheaton* v. *United States, supra; Johnson* v. *United States,* 207 F.2d 314 (C.A. 5, 1953), *cert. denied,* 347 U.S. 938 (1953); *Ryan* v. *United States,* 191 F.2d 779 (C.A. D.C., 1951), *cert. denied,* 342 U.S. 928 (1951).

The presumption is even stronger when there is communication with a member or members of the jury after charge and during jury deliberation concerning the verdict. *Mattox* v. *United States, supra; Wheaton* v. *United States, supra; Little* v. *United States, supra.*

In 1892 Chief Justice Fuller, speaking for a unanimous Court, said:

> "It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated. Hence, the separation of the jury in such a way as to expose them to tampering, may be reason for a new trial, variously held as absolute; or *prima facie,* and subject to rebuttal by the prosecution; or contingent on proof indicating that a tampering really took place. Wharton, Cr. Pl. and Pr. § § 821, 823, 824, and cases cited.
>
> "Private communications, possibly prejudicial between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Mattox* v. *United States, supra* at 150.

There is absolutely no way by which we can know that these phone calls—totally unmonitored as far as the outside party is concerned—were harmless. I believe that Judge Weinman was correct in relying on this ground also.

THE OPINION OF THE COURT

For the reasons stated, I find myself in disagreement with the Court concerning the fundamental issues of this appeal.

My brothers have, however, written a careful and scholarly opinion. I concur with the result reached in three out of the five of the issues discussed therein.

The federal courts, of course, do not review claimed federal constitutional violations until state remedies have been exhausted. Thorough as have been petitioner's efforts in this regard, it cannot be clearly established that claimed violations of defendant's Fifth Amendment rights (through lie detector testimony) have been presented to the Ohio Supreme Court. Nor have the belated witness statements as to the trial judge's comments on defendant's guilt ever been considered by that body.

I also agree with my brothers that the clamorous and frequently abusive publicity *prior* to trial, plus the trial judge's denial of change of venue, probably did not, of themselves, rise to the level of constitutional violations.

As Judge O'Sullivan notes, the number of jurors with fixed opinions about this case as of the time the jury was seated does not show the same extent of deep and abiding community prejudice demonstrated in *Irvin* v. *Dowd, supra,* and *Rideau* v. *Louisiana, supra.*

Of some weight in the consideration of the pretrial publicity issue is a concern for that particular declaration of rights which our forefathers chose to put first among the amendments. If the exercise of freedom of speech or press

in reporting or exposing crime could serve to immunize a person charged with crime from prosecution and trial, shortly the demands for limitation of this historic right would become extremely pressing. The smarter criminal would know how to find a means to immunize himself from trial by securing publication of a well-timed if adverse story. The power of the press to aid in maintaining the integrity of government by exposing corruption or special privilege would be largely nullified.

In one of the relatively few cases where the United States Supreme Court has set aside State court convictions because of pretrial publicity, Mr. Justice Clark noted:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Spies* v. *Illinois,* 123 U.S. 131; *Holt* v. *United States,* 218 U.S. 245; *Reynolds* v. *United States, supra.* [98 U.S. 145]." *Irvin* v. *Dowd, supra* at 722-23.

To return to the basic problems of this appeal, it is clear that the District Judge considered the claimed violations of due process against the background of the trial itself and cumulatively in relation to each other. His opinion notes:

> "Any one of the above mentioned factors, i.e., the insidious, prejudicial newspaper reporting, the refusal of the trial judge to question jurors regarding an alleged prejudicial radio broadcast and the carnival atmosphere which continued throughout the trial, would be sufficient to compel the conclusion that petitioner's constitutional rights were violated. But when they are cumulated, this Court cannot, unless it were to stretch its imagination to a point of fantasy, say the petitioner had a fair trial in view of the publicity during trial." *Sheppard* v. *Maxwell*, *supra* at 63.

Against this view, I read the Court's opinion as holding that no one of the complaints of contacts or communications with this jury was sufficient *standing alone* to represent invasion of petitioner's due process rights.

If we were to assume that the five instances of unauthorized communications to this jury, considered as entirely isolated incidents, did not rise to constitutional magnitude,[12] we still could not by such dissection of this trial ignore our constitutional duty to look at the trial as a whole and to determine from the total record whether the Fourteenth Amendment command of due process had been violated.

These five events which occurred during this trial, when considered cumulatively and against the trial background related at the outset, leave no doubt of the validity of the District Judge's holding that "petitioner was not afforded a fair trial as required by the due process clause of the Fourteenth Amendment."

Any other view would deny common sense as effectively as saying that since no single one of the 35 wounds was necessarily fatal, Marilyn Sheppard was not murdered.

Patently there can be judicial error which against the

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[12] As to the instances of communications numbered 1, 2, 3, and 5 herein, there is little reason to accept such an assumption.

background of one case might be harmless, but which against the total circumstances of another case might violate substantial rights. *United States* v. *McMaster and Wolff*, . . . F.2d . . . (C.A. 6, 1965) (Nos. 15,828-29, Decided March 25, 1965. Cf. *Krulewitch* v. *United States*, 336 U.S. 440 (1949); *Kotteakos* v. *United States*, 328 U.S. 750 (1946).

The background facts of a case wherein due process violations are claimed are never irrelevant. *Irvin* v. *Dowd*, *supra; Rideau* v. *Louisiana*, *supra.*

In *Marshall* v. *United States*, 360 U.S. 310 (1959), the United States Supreme Court dealt with a claim of prejudice because inadmissible material from news accounts had reached the jury during trial. Noting the large discretion that the trial judge had in ruling on the issue of prejudice, the Court nonetheless reversed for a new trial stating that "each case must turn on its special facts."

The "special facts" of this case compel my vote for affirmance. They come as a distinct shock to the conscience of this former state court judge.

As we have noted, Judge Weinman's duty to review petitioner's federal constitutional claims concerning his state court trial cannot be disputed. *Fay* v. *Noia*, *supra; Townsend* v. *Sain*, *supra; Gideon* v. *Wainwright*, *supra.*

I read such cases as *Turner* v. *Louisiana*, *supra; Rideau* v. *Louisiana*, *supra; Irvin* v. *Dowd*, *supra*, as applicable *a fortiorari* to the fact situation heretofore outlined and as authority for issuance of the writ, unless a new trial is ordered.

I would affirm.

APPENDIX A

PRETRIAL ORDER
AGREED STATEMENT OF FACTS

"Petitioner, Samuel H. Sheppard, was in July, 1954, a resident of Bay Village, Ohio, a suburb on the west side of Cleveland. He was a doctor of osteopathic medicine, specializing in Surgery, and a member of the staff of the Bay View Hospital. He was thirty years of age and was married to Marilyn Reese Sheppard, also thirty. They had been married for nine years and had one son, aged seven. Petitioner and his family lived in a house on the shore of Lake Erie, which house was owned by Marilyn. Petitioner was associated in the practice of medicine with his father and two older brothers, all doctors. He was in comfortable financial circumstances.

"On the night of July 3, 1954, petitioner and his wife entertained friends, Don and Nancy Ahearn, in their home. The Ahearns left at approximately 12:30 a.m., July 4, 1954; Marilyn saw them to the door, for petitioner was or appeared to be asleep on a couch in the living room. The evening had been a congenial one, and the Ahearns observed no indications of hostility between petitioner and his wife (who was pregnant) at any time during the evening. In fact, there were overt manifestations of affection between them.

"Shortly before 6:00 a.m. a telephone call was received from petitioner by J. Spencer Houk, mayor of Bay Village and a friend of petitioner. Houk lived two houses distant from the home of petitioner. Houk heard petitioner say:

> 'My God, Spence, get over here quick, I think they have killed Marilyn.'

Houk dressed and with his wife, Esther, drove within a short time the few hundred feet to petitioner's home. Upon arrival the Houks found petitioner on the first floor of the

house. His face showed some injury, and he complained of pain in his neck. Esther Houk went up to the bedroom, at the suggestion of petitioner, to check on the condition of Marilyn Sheppard. She found Marilyn lying in a pool of blood on the bed. She was dead. The room was covered with splattered blood. It was determined that she had suffered some thirty-five blows about the head by some blunt instrument, causing death. There was some conflict as to how long she had been dead when discovered by the Houks.

"The story given by petitioner to police and at the trial, was substantially as follows: As he was sleeping on the couch, he was awakened by a noise coming from the second floor. He thought he heard his name called. He went up the stairs, which was dimly lit by a light in the hall. He recognized only a white 'form' standing next to the bed where his wife slept. He grappled with the form, and was struck on the back of the neck which rendered him unconscious. Before losing consciousness petitioner heard loud moans, as if from someone injured. When petitioner recovered consciousness, he examined his wife, found or thought that she was dead, determined that his son (in an adjacent room) had not been harmed, and then, hearing noise of some sort on the first floor, ran down. He saw a form running out the door of the house nearest to Lake Erie, and pursued it to the shore. There he struggled again, and again lost consciousness. When he came to, he went back to the house, re-examined his wife, and called Mayor Houk. Petitioner was unable to establish (1) the number of people in the bedroom at the time of the first encounter or the time of said encounter; (2) the duration of his unconsciousness on either occasion, or (3) the sex or identity of any of the single or several assailants he encountered. He stated that his perceptions had been vague because he was asleep at the outset of the chain of events, and unconscious twice as it progressed.

"In the course of interrogations by police and the County Coroner, petitioner was asked if he had had sexual relations with one Susan Hayes, an ex-employee of the hospital, in March, 1954, in Los Angeles. Petitioner denied this, but later admitted it when confronted with her statement of the affair. The state contended that Miss Hayes was the motive for a premeditated murder, but the jury returned a verdict of murder in the second degree.

"The murder of Marilyn Sheppard captivated the attention of news media in an unprecedented manner. Editorials on the first page of a leading Cleveland newspaper, and news media generally, set up a hue and cry for a solution to the crime. An inquest was demanded and held, and petitioner's arrest was suggested most strongly by at least one leading newspaper. On July 30, 1954, petitioner was arrested; he was admitted to bail, and indicted a few days later, on August 17, 1954. He has been in custody ever since.

"The trial began on October 18, 1954, and on December 17 of the same year the cause was submitted to a jury in the Court of Common Pleas of Cuyahoga County. On December 21st the verdict of guilty of murder in the second degree was returned, and petitioner was sentenced to life imprisonment in the state penitentiary at Columbus, Ohio. . . .

"The details of the trial, which fill over seven thousand pages in the bill of exceptions, are not recited here; it is the understanding of counsel for both sides that it was not the purpose of this history to describe the voluminous evidence.

"On January 3, 1955, the trial court overruled a motion for a new trial which had been based on numerous assignments of error occurring during trial and deliberation. . . .

"On May 9, 1955, the trial court denied a supplemental motion for new trial on ground of newly discovered evidence

and based upon the affidavit of Paul Leland Kirk, a criminologist, who claimed to have demonstrated that blood tests made in the murder room proved the existence of blood which did not come from the defendant or the deceased. This evidence was not obtained until after the verdict had been returned.

"On July 20, 1955,[1] the Court of Appeals of Cuyahoga County affirmed the conviction of petitioner; and on July 25, 1955 the same Court affirmed the denial of the second motion for new trial. . . .

"On May 31, 1956, the Ohio Supreme Court affirmed the action of the Court of Appeals as to the case in chief, but did not discuss or pass upon the alleged newly discovered evidence. Two Judges dissented, expressing the view that Sheppard should be accorded a new trial. . . .

"On November 14, 1956, the Supreme Court of the United States denied a petition for certiorari; application for rehearing was denied on December 19, 1956. . . .

"On September 5, 1960, Chief Justice Weygandt denied an application for a writ of habeas corpus in the Ohio Supreme Court; the petition therefor was dismissed on May 5, 1961.

"On April 11th, 1963, petitioner filed a petition for a writ of habeas corpus in this Court, which is the action giving rise to this order.

"Petitioner, Samuel H. Sheppard, has at all times maintained that he was not guilty of the murder of his wife, and that he knew no more about said death than he told at the trial."

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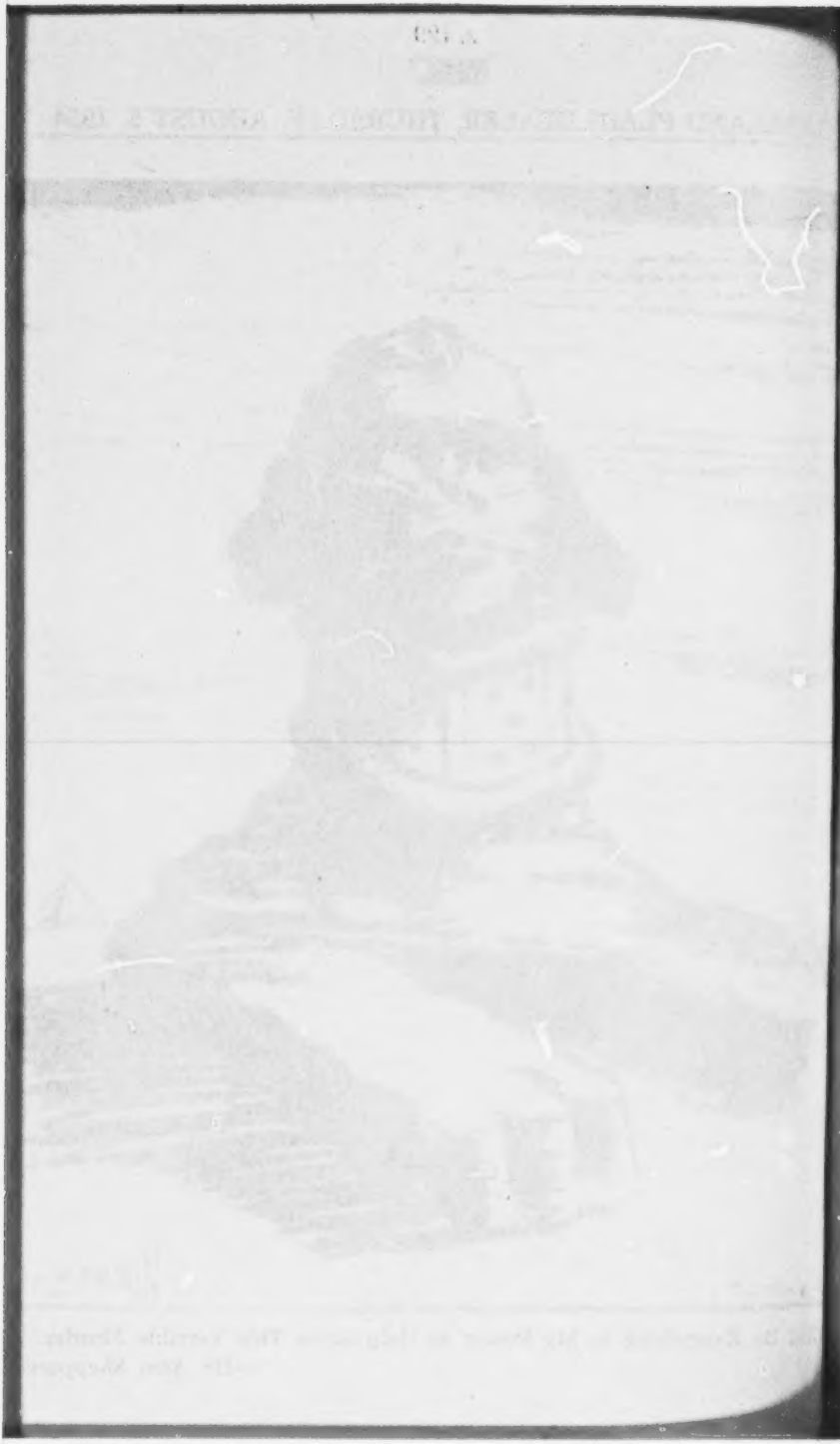
[1] "It is a minor point, but the Court notes that several of the dates of decisions are incorrectly stated."

CLEVELAND PLAIN DEALER, THURSDAY, AUGUST 5, 1954

Will Do Everything in My Power to Help Solve This Terrible Murder."
—Dr. Sam Sheppard



THE COORDINATOR.

The November 1, 1954, issue of *The Coordinator,* a semi-monthly news letter of the American Bar Association, carried the following:

"PRESS SOUNDS ALARM ABOUT SHEPPARD TRIAL PUBLICITY

Some sections of the press are worried about the sensational publicity accorded the Dr. Sheppard trial in Cleveland. Editor & Publisher, leading trade paper of the Fourth Estate, says in an editorial in the October 23 issue:

'Newspaper reporters, photographers, editors, TV and movie cameramen seem intent on creating a circus of the Dr. Sheppard trial. If the coverage continues in the same sensational vein of the opening days, it could set the cause of courtroom photography back 20 years (even though they operate in the courtroom only when it is not in session) and do irreparable damage to the newspapers' fight against the charges of "trial by newspaper."

'The trial is certainly of wide national interest and the judge so recognized it by agreeing to turn over practically all the spectator seats to newspaper and radio reporters. Pictures are permitted while the court is not in session. But it seems to us that in exercising these rights and privileges, the working press has created a spectacle that certainly will not reflect to the advantage of the press as a whole, meaning all media represented there, and provides ammunition to the critics. All the old-fashioned sensational techniques have been dusted off for this trial including the "sobsister" approach. It is not too late for newspaper editors, and editors of other media, to stop the practices which can only redound to the discredit of all media.' "

NEWSPAPER INSTITUTE OF AMERICA.

The Newspaper Institute of America, 1 Park Avenue, New York, in commenting on the Sheppard trial, stated:

> "Coverage of the Sheppard murder trial in Cleveland has been a disgrace to American journalism and brought back all the traditions of yellow journalism."

EDITOR AND PUBLISHER.

Commenting on this charge in the December 4, 1954 issue of *Editor & Publisher,* Editor Robert U. Brown agreed, with one qualification. Brown thought "the guilty parties are a small minority of the daily newspapers and confined almost exclusively, to some, but not all, in the large metropolitan cities." "A trial for murder is supposed to be a serious business," Brown wrote, "but as the Sheppard trial has lagged in developing headline revelations, reporters have resorted to interviewing jurors' families, interviewing each other, analyzing the case on the basis of evidence not yet admitted, interviewing personalities on the courthouse steps for a television program, etc."

EDWIN M. OTTERBOURG.

Edwin M. Otterbourg, Past President, New York Lawyers Association, and Chairman, Special Committee on Fair Trial and Free Press,

> (See also "Fair Trial and Free Press" by Mr. Otterbourg, New York State Bar Bulletin, April 19, 1955, page 103.)

addressed the Prosecuting Attorneys Association of Ohio, at the Hotel Statler, Cleveland, on December 11, 1954. This address was made while the case of the State of Ohio vs. Sheppard was in progress. In that speech, which was published in the Bulletin of the Cuyahoga Bar Association for January, 1955, he stated:

"Before the current trial referred to commenced, a leading newspaper in one of your important neighboring cities said:

'As a newspaper, we are rather frightened by the way in which the case * * * is being tried in the press. It is the function of our judicial authorities to present the facts under the strict laws of evidence to 12 good men and true and let them pass judgment on them. But how can that successfully be done if facts and rumors, hearsay, and innuendoes are all run together in sensational newspaper stories before the case ever comes to trial?'

The newspaper articles contain predictions of forthcoming testimony long before it has been offered in court, and some of them print testimony which was stricken out at the trial by the Court. Personal likes and dislikes are highlighted by constant characterizations of both testimony and of witnesses; thus, certain testimony is characterized as being 'most damaging' and other as being 'shaky' or being 'gingerly' and 'unwillingly' given. Even in an account of the trial, it has been reported that copies of certain exhibits have been mailed out by the district attorney's office, and to whom and for what purpose.

In this reckless competition for copy, it even happened that a reporter was sent to the home of a juror while the trial was going on to take photographs of his family, home surroundings and the like!

They have no more right to do these things than they have to invade the secrecy of the ballot box by asking a voter what he did."

"THE ASHEVILLE CITIZEN.
Thursday, December 23, 1954

THE SHEPPARD CASE

A second degree murder conviction has closed the Sheppard murder case for the time being, though hardly on a note of public satisfaction. The verdict, built on the merest circumstantial evidence, must strike many persons as utterly preposterous.

Dr. Samuel (the "Sam" of the tabloids) Sheppard may have dispatched his pregnant and evidently loving wife in the brutal manner related. But Ohio apparently applies strange construction to motivations and evidence. The state did not establish a motive that anybody in his adult right mind and unaddicted to soap operas could possibly credit. It did not produce a murder weapon. On the other hand, it introduced evidence of doubtful relevancy from witnesses who might have been bounced out of the ordinary courtroom. Ohio justice, if that is what it is, wears a strange countenance indeed.

Of course, Dr. Sheppard was not really tried for murder. He was tried for manifold and specified sins and indiscretions which, while offensive to society, do not rate a murder rap. And in this the irresponsibles of American journalism had such a heady fling as they have not enjoyed since the days of Hall-Mills, Snyder-Gray, and Daddy and Peaches Browning—historic orgies of the press excusable only because they happened in the madcap 1920's.

One is reminded of William Randolph Hearst's famous cablegram to his correspondent in Cuba in 1898: "You furnish the pictures and I'll furnish the war." The Sheppard case was a set-up for the sob sisters and the little minds who write suggestive headlines. So, despite the defendant's convincing show of innocence on the stand and under the bright lights of a skull session with Cleveland detectives, the Lothario-doctor-ne-er-do-well was a gone

goose from the time the trial got into its second week. For 12 men and women who were more a Greek chorus than a trial jury gave back just what they were fed out in as notorious and vulgar a travesty on justice as ever affronted the dignity of the law in America."

NEWS WEEK.

News Week, January 3, 1955, carried an article entitled, "Disgraceful":

> "Nearly 30 years ago the late Adolph Ochs, publisher of the New York Times, issued a definitive statement on newspaper coverage of murder. When asked why the usually crime-wary Times was playing up the sensational Hall-Mills slaying, he explained:
>
> 'The yellows see such stories only as opportunities for sensationalism. When the Times gives a great amount of space to such stories it turns out authentic sociological documents.'

Sensationalism or sociology, the story of Dr. Sam Sheppard has consumed an astonishing amount of newsprint since the early morning of July 4, when the young osteopath reported that someone had bludgeoned to death his pregnant wife in their fashionable home in a Cleveland suburb. The story snowballed to such an extent that, after Dr. Sam's trial began in mid-October, one-third to one-half of the nation's newspapers were front-paging daily developments.

Was such feverish coverage justified? In Cleveland, Louis Seltzer, editor of the Press, whose July editorials 'Someone is Getting Away with Murder' were a big factor in getting Dr. Sam arrested, had a clear conscience: 'This is the first time in a generation that a murder case appeared to embrace all the classical ele-

ments of mystery, sex, effort to thwart justice, and intrigue * * *. We at the Press did an honest, forthright journalistic job in bringing the case to justice.' The night of the verdict, the Press sold 30,000 extra papers."

THE PROGRESSIVE.

The Progressive, Madison, Wisconsin, January, 1955:

"Both papers publish handy indexes on page one to direct traffic to the many fruity bits of trial coverage elsewhere in the paper. The Press excels at a daily compendium of 'sidelights' or program notes. In both papers, the trusty sidebar is the city editor's best friend (Sidebar: a subsidiary story, often of a light or humorous character, illuminating some incidental aspect of the news). Thus you read that Judge Blythin takes the most comprehensive notes of any of the principals, that a smile flickered across the face of Juror Barrisch when Witness Ahern told how his wife sat on his lap; that two Texas ladies, in Cleveland for a convention, visited the trial and sociably gave reporters their views on women as jurors. What the ladies are wearing, how visiting lawyers appraise the technical performance of prosecution and defense, anecdotes and random impressions—all are set down in a relaxed, gossipy way, as if the event were a ball game or a gala concert.

The Press almost always reports the trial in terms of Dr. Sam's reaction to it. Thus on Tuesday he 'scowled and reddened' at the testimony of Mrs. Ahern. On Wednesday his face 'reddened' at the testimony of Mrs. Houk. On Thursday the death photos of his wife, which were shown to the jury but not to him, gave him a 'bad time,' and an imported Scripps-Howard expert reported that Dr. Sam 'couldn't take it'—he 'put one hand to his face and looked down at

the floor. His lips moved. He gulped hard. His body jerked nervously.'

And so it went, week after week. That the public was eating up the story, the Cleveland papers never doubted. One week a barber from Pennsylvania, wearing a green vest and white gloves with the fingers cut out, picketed the Courthouse. He was jailed for contempt but later released in custody of his relatives. This was also the week when a disturbed woman was led away from trying to get into the courtroom with a 'message from God.' It was the week when a Cleveland man was jailed for mailing cryptic letters to jurors, and when Rabbi Rudolph Rosenthal devoted his Friday night sermon at Temple-on-the-Heights to the trial and its coverage.

Rabbi Rosenthal denounced the 'vast amount of space, utterly disproportionate, that trails through the pages of our dailies, sensational materials hardly calculated to teach a higher appreciation of fellow human beings.' He likened the papers' handling of the trial to a 'Roman circus.' Concluding on an optimistic note, he remarked, 'It is our hope that the newspapers will prove to be their own best censors.'

As the rabbi found out, self-censorship in Cleveland would just have to wait till the Sheppard trial was over."

THE TOLEDO BLADE.

The *Toledo Blade*, Wednesday, December 22nd, in an editorial entitled "Free Press and Fair Trial":

"At this distance, some 100 miles from Cleveland, it looks to us as though the Sheppard murder case was sensationalized to the point at which the press must ask itself if its freedom, carried to excess, doesn't interfere with the conduct of fair trials.

The hue and cry raised in Cleveland newspapers after Marilyn Sheppard was found murdered could not help but inflame public opinion even as it pointed the finger of suspicion. One of the papers, which virtually demanded the arrest of Dr. Sheppard, almost had a vested interest in his conviction.

During the long-drawn-out trial the Cleveland papers and a good many others treated it like a Roman holiday. With a man's life at stake, they competed with one another in whipping the evidence up into one sensation after another. Skeletonized summations of lengthy testimony came pretty close to drawing conclusions from it.

Day after day the public, and the jurors, were treated to opinion-shaping headlines, such as:

Quit Stalling and Bring Him In
Sam Declined July 4 Lie Test
Says Dr. Sam Talked Divorce
Testifies Sam Changed Stories
Charges Sam Faked Injuries
Says Marilyn Called Sam a 'Jekyll-Hyde.'

In either event, there was considerable criticism of the way this story was handled which came not alone from judges and lawyers but also from the public. And we think that it is justified, because we do not believe that the rights of a free press are paramount to that of a fair trial.

After all, a fair trial, involving the age-old struggle of the individual against all-powerful government, is the most basic, the most essential of all human rights.

From the dawn of civilization mankind has looked to it as the first line of defense against oppression under any form of government. Before the other powers of kings and tyrants were questioned, the

right of courts to do justice between them and their subjects was demanded and sometimes accepted.

In modern times even dictatorships, of the man on horseback or of a collectivized people, have at least pretended to keep their hands off the courts so that they could at least appear to hand down judgments according to the law and the evidence.

And should American newspapers do less today?

The freedom of the press, gained in the last century or so as the democratic concept evolved, is not an absolute. It is much more like a sociai tool to be used wisely and responsibly for the public good. And newspapers employ it to their peril when they interpose themselves between the people and their courts and undertake to try cases in print before, or as, the evidence is presented to the jury."

THE DEKALB NEW ERIE.

The *DeKalb, New Erie,* Dekalb, North Carolina, Thursday, November 4, 1954:

"Regardless of how the Samuel Sheppard murder trial in Cleveland comes out, one thing is certain. The public is being fed in dime novel fashion the minute details and in language that would do justice to the coronation of a king.

Another thing is as certain also. By the time the trial is completed, it will not make too much difference to Dr. Sheppard's character whether he is declared innocent or guilty. And so for Juror J. R. Manning. His character is being tenderly shredded by the barbed wires of publicity. If he has spent more than a decade in repentance and atonement, those efforts are wasted now.

We do not know whether or not Dr. Sheppard is guilty or innocent. That is not the point. What is of

far more importance to a far greater number, is it fair and just to make a carnival out of an occasion, when that occasion is a legal effort to ascertain whether or not a man shall die? We believe it is unfair and unjust.

The whole matter touches on a phase of our freedom that is desperately important."

"FAIR TRIAL AND FREE PRESS"

Honorable Florence E. Allen, Judge of the United States Court of Appeals for the Sixth District

American Bar Association Journal, 1955, page 900:

"* * * Canon 35 should be strictly enforced. It should be enforced by the Bar, by the court with the support of the Bar, and by the newspapers themselves. For, as a prominent newspaper recently stated concerning a nationally famous case, the case had been 'sensationalized to the point at which the press must ask itself if its freedom carried to excess doesn't interfere with the conduct of fair trials.'

> After all (said the report), a fair trial, involving the age-old struggle of the individual against all-powerful government, is the most basic, the most essential of all human rights * * * Freedom of the press, gained in the last century or so as the democratic concept involved, is not an absolute * * * And newspapers employ it to their peril when they interpose themselves between the people and their courts and undertake to try cases in print before, or as, the evidence is presented to the jury. We do not believe that the rights of a free press are paramount to the right of a fair trial.

After all, our liberty is based not only on freedom of the press, vital as that is. It also is based upon freedom of the individual. Freedom from conviction on hearsay testi-

mony, freedom from conviction following upon years of confinement without the issuance of any charge, both of these freedoms are essential. Without them our wealth, our material power, our mass production, will eventually come to nothing. With both of them, America truly is, as Lincoln said, 'the last best hope of earth.' ''

CONNECTICUT BAR JOURNAL.

Volume 29, March, 1955.

Article by Herbert Brucker, Editor of the Hartford Courant.

Page 47:

"In the same way we heard much recently as to what a horrible example the Sheppard case was of trial by newspaper. Now there were undoubtedly departures from the highest standards in those proceedings. And lawyers should be interested to note that ten of fourteen newspaper editors, in a panel from the American Society of Newspaper Editors, felt that the Sheppard case was the most overplayed story of 1954. At the same time, it seems fair to ask lawyers also to note that, when the defense in the Sheppard trial sought retrial, the judge ruled that newspaper publicity had not influenced the jury's verdict. Maybe he wasn't the most objective of oracles, but that's what the man said."

"THE PRESS VS. THE COURTS"

John M. Harrison, Associate Editor of the Toledo Blade.

The Saturday Review, October 15, 1955.

"The savage slaying of Marilyn Sheppard, wife of Dr. Samuel Sheppard, sometime in the early morning hours of July 4, 1954, was bound to stir public feeling. It didn't require newspaper stimulation. As the case developed, it was a classic murder story—compounded of all the ele-

ments of fictional and historic crime. Tremendous emotional impact, pathos, and suspense were inherent in the events about which the trial centered.

But these weren't enough for the Cleveland newspapers. Almost from the moment Marilyn Sheppard's body was found, the press took over the roles of detective, sheriff, prosecutor, judge, and jury. One newspaper—in a front-page editorial headlined QUIT STALLING AND BRING HIM IN—demanded the arrest of Dr. Sam Sheppard in language that could only create a strong supposition of his guilt in the minds of the readers. Throughout the pre-trial stages, highly prejudicial material appeared in what were represented as news accounts of the developments. The orthopedic collar Dr. Sheppard wore—supposedly because of injuries inflicted by his wife's killer—was caricatured in cartoons. Simulations of the collar became part of the play equipment of Cleveland children who engaged in games of 'murder.'

Once the trial began, all three Cleveland newspapers offered extensive daily summaries of testimony from which their repeatedly drew their own conclusions, either directly or by adroit manipulation of headlines. The press never left any doubt of the verdict it expected, not surprisingly in view of having plunged so deep into the processes of administering justice by its own rules.

The question of Dr. Sheppard's guilt or innocence still is before the courts. Those who have examined the trial record carefully are divided as to the propriety of the verdict. But almost everyone who watched the performance of the Cleveland press agrees that a fair hearing for the defendant, in that area, would be a modern miracle. Which underlines the question whether there must be some limitations on the freedom of the press in order to insure a fair trial—a historic right men have demanded and defended since before Magna Charta."

"THE PHOTOGRAPHER'S DAY IN COURT"

Glenn R. Winters, Editor, Journal of the American Judicature Society, October-December, 1955.

"LOTS OF WATER has gone over the dam, ink over the presses, and developer fluid down the drain, since the American Judicature Society's two luncheon programs on courtroom publicity were presented in Atlanta and Portland in the spring of 1954. Dozens of similar public discussions have been staged by bar associations and other organizations, and a joint committee of representatives of the American Bar Association and the various media of communication has been appointed and held a meeting in Washington to set up plans for a study of Canon 35.

Meanwhile, as though to provide an up-to-the-minute case in point, the Sheppard murder trial in Cleveland came along to go down in history with other celebrated examples of "trial by newspaper." Here are some headlines that sold Cleveland newspapers in the autumn months of 1954:

QUIT STALLING AND BRING HIM IN
SOMEBODY'S GETTING AWAY WITH MURDER
SAM DECLINED JULY 4 LIE TEST
SAYS DR. SAM TALKED DIVORCE
TESTIFIES SAM CHANGED STORIES
CHARGES SAM FAKED INJURIES

The editor of the Providence Journal and Evening Bulletin declared that "if the newspapers of America had set out deliberately to prove the proposition that abuse of press freedom can wreck the impartial administration of justice, they could not have done a better job than in their reporting of the Sheppard trial."

[redacted]

DEFENDANT'S EXHIBIT KK.

s. 146

[redacted]

DEFENDANT'S EXHIBIT 7.

[redacted]

DEFENDANT'S EXHIBIT RR.

[redacted]

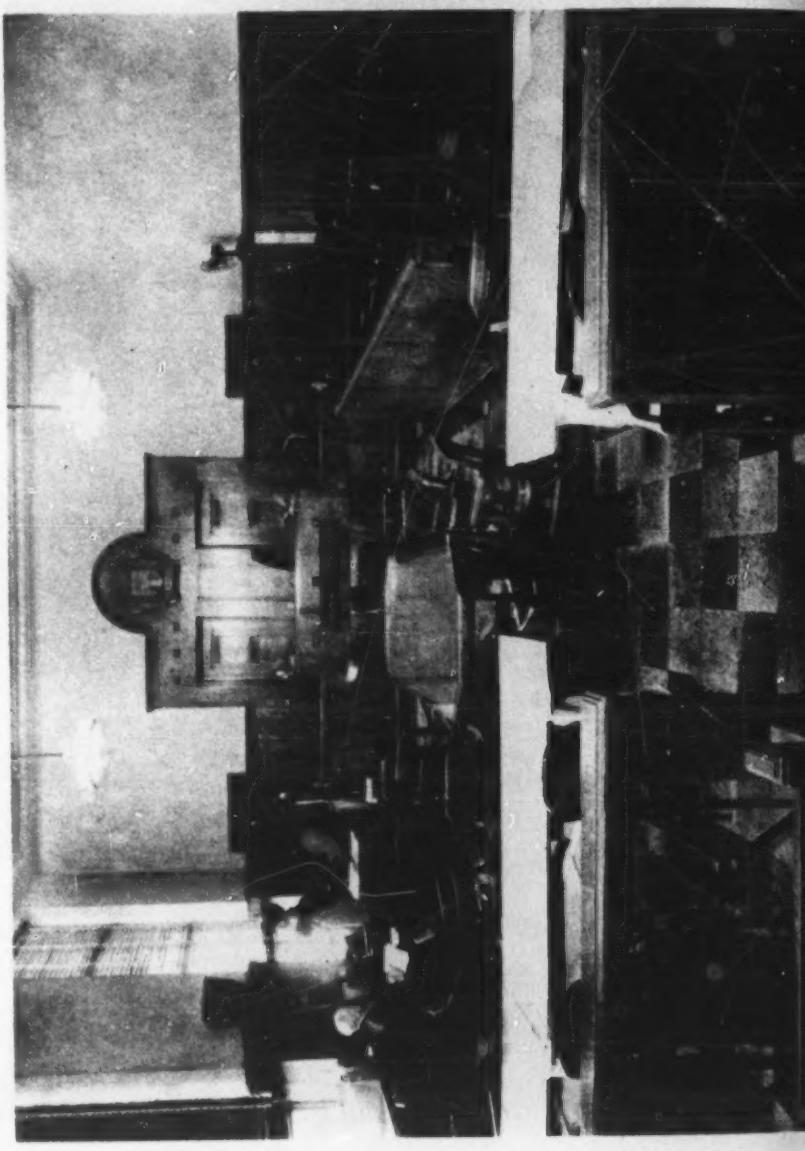
DEFENDANT'S EXHIBIT PP.

[redacted]

DEFENDANT'S EXHIBIT HH.

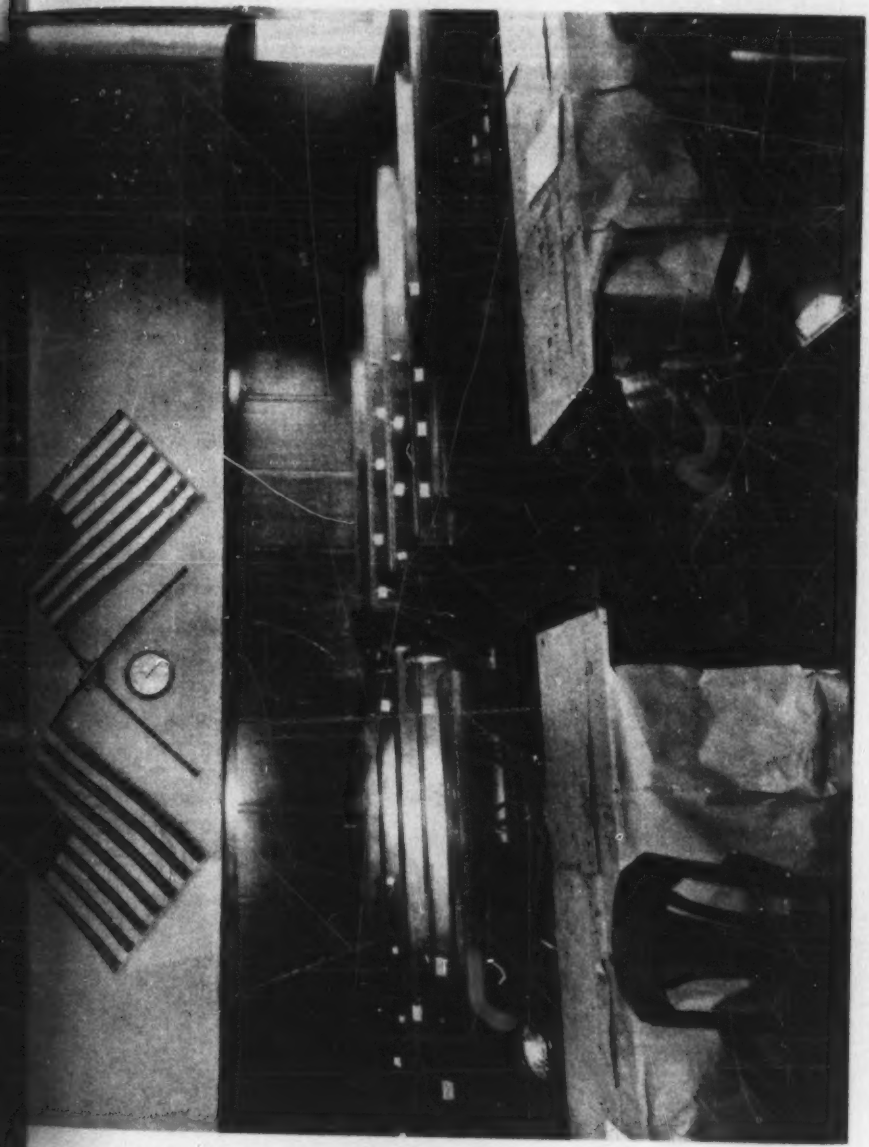
[redacted]

DEFENDANT'S EXHIBIT 74.



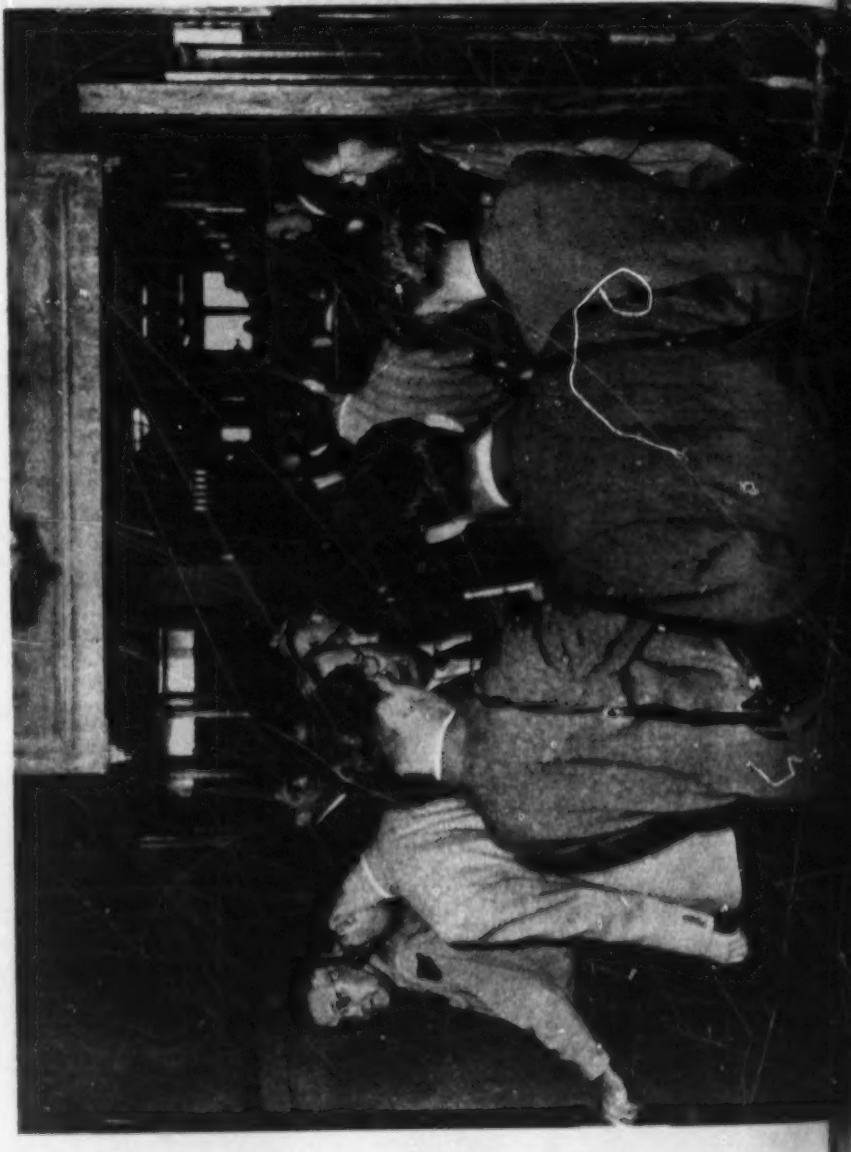
[redacted]

DEFENDANT'S EXHIBIT 69.



[redacted]

DEFENDANT'S EXHIBIT 75.



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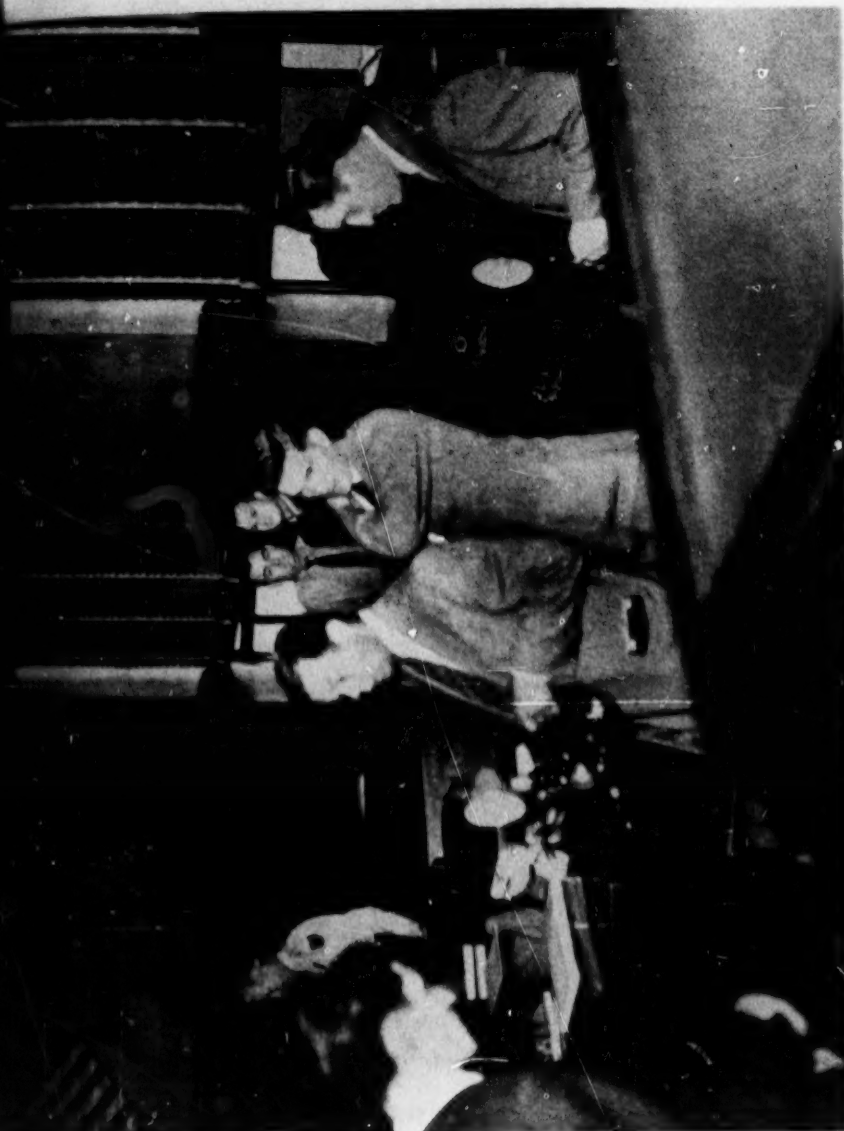
DEFENDANT'S EXHIBIT 72.

[redacted]

DEFENDANT'S EXHIBIT 71.

[redacted]

DEFENDANT'S EXHIBIT 76.



s. 156

[redacted]

DEFENDANT'S EXHIBIT 73.

DEFENDANT'S EXHIBIT 13.

On Monday, August 23rd, Defendant's Exhibit 13 was served on Chief Eaton. The exhibit is as follows:

"Mr. John Eaton,
Chief of Police,
Bay Village, Ohio.

Dear Sir:

As you are well aware, my wife, Marilyn, was murdered July 4th, 1954. Since that time my home and the grounds surrounding it and all my personal property has been in the possession of the police.

I have not been back to my home, except when accompanied by police officers. Both myself and my son have been deprived since July 4th of the possession of my home.

No permission was given by me to anyone to take over this control.

I did not interfere with your possession in any way, or attempt to gain possession of my home, or protest about the action, because I desired to give the authorities every opportunity to make a complete examination of my home, its contents, and the premises surrounding it, in the hope they could discover some clue that would lead to the murderer of my wife.

At the present time, as you know, I am in the County Jail, accused of being my wife's murderer. This accusation is absolutely false. I am informed that certain furniture and other personal property have been moved from my home, without my knowledge or consent.

I am also informed that the premises have been roped off, and that my home is now distinguished in

that way from other houses in the neighborhood and has become the subject of curiosity, and that thousands have stopped and stared at my home.

My child's personal belongings are in his home, and it now becomes necessary to prepare him for school, and in order to do so, he must have access to his home. You have now been in possession for 50 days, which is ample time to make any necessary inspection. Inasmuch as my imprisonment prevents me from personally looking after my property, I am requesting my attorneys to act for me.

I, therefore, demand that you turn over to my attorneys any keys that you have to my home, and that you give my attorneys a list of all personal property that has been removed during the time that you have been in possession. My attorneys are: Arthur Petersilge, Fred Garmone, and William J. Corrigan.

This demand delivered to you by any one of them shall constitute delivery by myself.

Respectfully yours,
(Signed Sam H. Sheppard)

Service of the foregoing demand acknowledged this 23rd day of August, 1954.

(Signed) John Eaton
Chief of Police
City of Bay Village, Ohio."

AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL.

"Now come William J. Corrigan and Fred W. Garmone, Attorneys for Sam H. Sheppard, the defendant, and in support of the Motion for New Trial, being duly sworn, say:

"That the judge in this case several days before the day of trial met with newspaper reporters, newspaper

photographers, television personnel and radio commentators and arranged the courtroom in such a manner that the representatives of the press, radio and television were given preference to the space in the courtroom. He also caused to be built and erected inside the bar a long table, which extended across the courtroom, and approximately twenty newspaper reporters were assigned seats at this table. One end of the table was within three feet of the jury box. Outside the bar there are four rows of benches, which are for the use of the public during trials. Each of these benches will seat about twenty persons. The Court assigned the first three rows to the personnel of the press, radio and television and in advance of the trial caused printed slips to be made with the names of such personnel printed thereon, and said printed slips were pasted at regular intervals along said row of benches so that said personnel referred to would know which place was assigned to him or her. The last row was reserved for members of the defendant's family and members of the family of the deceased Marilyn Sheppard. The Court established a rule that the admission of other persons to the courtroom was to be by card. The Court also assigned to said newspaper, radio and television personnel all the rooms on the courthouse floor, including the Assignment Room, where cases are assigned, to other courtrooms for trial. In these rooms said radio, television and newspaper personnel had private telephone lines installed and other necessary equipment to carry on their work. Space in the Assignment Room was set over for the Chicago Tribune, Chicago Sun, the New York Herald Tribune, the Akron Beacon Journal, The New York Journal American, the Associated Press, The Pittsburgh Post Dispatch, The New York Post, The New York Daily News, The International News Service and the United Press.

"There was also erected in that room special telephone

booths and telegraph equipment, which was used to forward with dispatch the reports of the trial.

"Rooms were also assigned to radio commentators on the third floor of the Courthouse. This is the floor on which the jury deliberating rooms are located. One such room located next door to the jury that was impanelled in this case was used by Radio Station WSRS and broadcasting continued from that room throughout the trial and during the time that the jury was in the room next door, and during recess, and during the deliberation of the jury.

"During the entire time of the trial a great number of photographers, both television and newspaper, stood on the steps of the courthouse, on the stairs that lead from the ground floor of the courthouse to the second floor and along the corridor on the second floor from the top of the stairs to the entrance of the courtroom. When the members of the jury came to court, when they arrived for lunch or retired at the end of the trial day, they passed along the way above outlined and were photographed and televised many times, all with the knowledge of the Court.

"On a number of occasions it was necessary for counsel to confer privately with the Court in chambers on points that were in issue in the trial. On such occasions when said conferences were held behind the closed door of the Judge's chambers, there would be a great rush of photographers, reporters, radio and television personnel into the room which adjoined the Judge's chambers. So great was the number that crowded into the room that it was necessary on such occasions for counsel to push their way out so that they could again regain their places in the courtroom. After counsel had secured their exit, then the great number of such persons as described would crowd into the Judge's chamber to inquire as to the purpose of the meeting.

"Each morning the defendant was brought into the courtroom approximately ten minutes before trial opened, at which time he was surrounded by photographers and television operators and was photographed and televised many times.

"Many times during the trial there was constant movement in the part of the courtroom occupied by said reporters, radio and television personnel. They kept going in and out and changing places and relieving one another.

"Pictures of the jurors were printed in the newspapers and were shown on television in the evening. Newspaper pictures were taken in the home of one juror by a Cleveland Press photographer and printed in that paper along with an account of how the juror's family fared while the juror was in court. The fact was called to the attention of the Court, but no action was taken.

"The Court permitted photographers to come into the courtroom and take pictures of the jury panel. The Court permitted photographers to go into the jury room and take individual pictures of the members of the jury. These pictures were printed in the newspapers.

"Television cameras were set up inside the courthouse with the knowledge and consent of the Court. During the trial the Court was part of a television program that took place on the steps of the courthouse in the morning at a time when the jurors were arriving. This program was arranged by a reporter named Fabian, a representative of the Scripps-Howard newspapers. The Court stood across the street and watched until he received a signal and then walked over to the courthouse steps, mounted the steps and had a conversation with said Fabian while the television cameras operated.

"On one day while the jury was leaving the courthouse, a man appeared on the Courthouse steps, carrying a sign referring to the case of Sam H. Sheppard. Counsel for the

defendant took this man and the sign before the Court and requested that he be charged with contempt. Several days later when counsel was not present, this person was released.

"For months prior to the trial news in the Cleveland newspapers were slanted against the defendant. A front page editorial appeared in the Cleveland Press demanding his arrest and urged he be subjected to the third degree. Day after day the public and jurors were treated to opinion-shaping headlines such as, *"Quit Stalling and Bring Him in"—"Sam Declined July 4 Lie Test"—"Says Dr. Sam Talked Divorce"—"Testifies Sam Changed Stories"—"Charges Sam Faked Injuries"—"Says Marilyn Called Sam A Jekyll-Hyde."*

"Statements were made by the Chief of Police, Inspector of Detectives, Head of the Homicide Squad, members of the Prosecuting Attorney's office, which were adverse and condemnatory of the defendant. Affiant says that none of said persons testified in the case.

"The defendant in his testimony stated facts bearing upon his questioning by Cleveland detectives. That evening the following headline appeared in the Cleveland News:—"Kerr calls Dr. Sam a bare faced liar." The "Kerr" referred to is Captain David Kerr, Head of the Cleveland Homicide Squad. Again, affiant says that said Kerr did not testify in the case.

"The jurors in their voir dire examination testified they read Cleveland newspapers and most of them had a Cleveland newspaper delivered into their homes.

"The jurors received the case at 10:30 A.M., Friday, December 17, and deliberated until 4:30 Tuesday, December 21st. This included deliberations on Sunday, December 19th, from approximately 10:30 A.M. to 6:00 P.M.

"During the deliberations the jury was ordered sequestered and placed in the charge of two male officers of the

court. During the period of deliberation the jurors were taken by the officers to their meals and at night were lodged in the Carter Hotel. During the time the jury was allowed to separate and no female officer of the court was appointed to supervise the female members of the jury.

"On one occasion the jury was separated and photographs taken of such separated groups. One photograph was taken of the women members of the jury in one group and another photograph showed the male members of the jury in another group. The photographs of the groups as separated were printed in the newspapers. Affiants say that in order to arrange such groupings, communications were made with the jury. Other photographs were taken of the jury while at their meals, coming to the courthouse

"Affiants further say that during the five days of deliberation and during deliberations, the jury was in a room that was up one flight of about twenty stairs from the courtroom; that the door from the courtroom to this flight of stairs was generally open; that during the deliberations the courtroom and the corridor outside was filled with curious onlookers, reporters, television, radio commentators and photographers. During this time card games were in progress in the courtroom, groups were visiting, a great number of people milled inside and outside of the courtroom, and the courtroom and corridors resounded with laughter, loud talk and noises. The floors of the courtroom and corridor became stained and dirty, and strewn about were papers, cigarette butts, empty paper cups and various litter; that the atmosphere that existed during the trial and during the deliberation of the jury was not conducive to profound and undisturbed deliberations.

"In support of this Motion, affiants attach hereto a Transcript taken on the hearing for bail, which is marked 'Exhibit 1,' and clippings from the Cleveland newspapers,

marked 'Exhibit 2,' and said exhibits are made a part hereof as though fully set forth herein."

BILL OF EXCEPTIONS—BAIL HEARING, EXHIBIT 3 ON MOTION FOR NEW TRIAL.

"Q. Mr. Winston, when you returned the indictment you made the statement that 'pressure on us has been enormous'?

A. That was part of the statement I made.

Q. Did you make that statement? (R. 69. Bail Hearing.)

A. Yes.

Q. What was the pressure that was placed on you?

A. Only curious people who wanted to know what we knew on the Grand Jury.

Q. Who were the curious people, and where did you talk to them?

A. I cannot name them; they are myriad.

Q. Where did they talk to you?

A. On the street, on the phone, in clubs that I belong to.

Q. Were you called at your office?

A. Yes.

Q. Were you called at your home?

A. Yes.

Q. When you said 'pressure on us was enormous,' when you made that statement, you were referring, of course, to the Grand Jury, weren't you?

A. Yes.

Q. And you knew that the kind of pressure that was placed on you had been placed on other members of the Grand Jury, hadn't you?

A. Yes."

Argument by counsel for the State of Ohio in opposition to defense motions for directed verdicts for acquittal (Tr. 4983-5008)

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

* * *

[4983] Mr. Mahon: If your Honor please, the State is well aware of the fact that it is the State's burden to prove its case beyond a reasonable doubt. The State is well aware of the fact that it is the obligation on the part of the State to prove all of the elements that go to make up the crime of murder in the first degree or the crime of murder in the second degree or a manslaughter finding.

There have been motions made here, your Honor, by the defense for the Court to dismiss the indictment or, in the alternative, to instruct the jury to find the defendant not guilty on the charge of murder in the first degree. There was also a motion that the Court dismiss this matter or instruct the jury as to second degree murder. Also a motion for the Court to direct as to a charge of manslaughter here, and also a motion to direct on assault and battery, and number six, on assault.

Now, as to the last two, assault and assault and battery, I don't think they have any part—should have any part in this [4984] discussion, because certainly if there was an assault and battery upon the victim here by this defendant, and that assault and battery resulted in her death, then it would be manslaughter. You don't have any assault and battery in this case, you couldn't have.

The Court: You can disregard those, Mr. Mahon. The Court will not charge on assault and battery, in any event.

Mr. Mahon: Now, on a first degree murder case, it is necessary that the State prove that the defendant unlawfully—or produce some evidence at this time that he unlaw-

fully and purposely and of deliberate and premeditated malice took the life of Marilyn Sheppard.

Now, how do you prove those elements? You can prove them by direct evidence; you can prove them by circumstantial evidence; you can prove premeditation by what a persons says or what a person does and how they do it. You can prove purpose to kill or intention to kill, they are the same, by the acts of the person, by the weapon that is used in the killing, and you can infer malice from the overall picture [4985] as it exists.

Now, what have we here? We have a woman who was killed. She is seen on the morning of July 4th lying in her bed covered with blood, the bed is soaked with blood, her blood. There are many wounds upon her head and upon her hands and face, 35 separate wounds on that woman. Whether some of them might have been done at one time, that is, might have been more than one injury sustained at a blow makes no difference. There were 35 wounds. There were wounds on the face, the head, on the hands, the back part of the hands. And it is easy to infer as to how the blows came—the wounds came to be on the hands. The impulsive throwing up of the hands to protect her face from these deadly blows that were being rained on her, and that is how the wounds got on the back of the hands.

Fingernail on one hand pretty near torn off. Whoever committed that type of a crime certainly had malice in their heart, had that depraved, wicked mind that you talk about, sir, to commit those kind of acts upon any human being. [4986] Is that any evidence of a purpose to kill or an intent to kill, if your Honor please? The instrument that was used, certainly a deadly instrument that fractured the skull, why, the frontal part of her forehead, Mr. Corrigan—you saw the photographs, looks like a checkerboard, and the skin was peeled back and photographs taken, it looks like a checkerboard.

Oh, and they say, "No, that isn't what she died from. She died from strangulation because blood got down into her lungs."

Well, where did the blood come from but from the wounds that was in the head? You say that that wasn't the proximate cause of her death.

Can you infer purpose to kill, if your Honor please, from those acts? Is there evidence that there was premeditation, if your Honor please? Whoever killed that woman with whatever instrument was used in accomplishing the thing that was done there was carried into that room. And why would someone carry a deadly weapon into a room if they didn't have something in their mind as to what they were going to use [4987] it for, and did use it for, if your Honor please?

And after that beating the weapon was taken from the room. Is that any evidence of premeditation, if your Honor please? Is there evidence of purpose to kill? Is there evidence of malice? Can't you readily draw those inferences right from the silent facts as they exist?

The lady who—the maid there said there was nothing missing from that room. The weapon that killed that woman, the weapon that killed that woman was taken from that room, and if there was nothing missing from the room, that is, the regular things that are in the room, then the weapon must have been carried into the room and used. And even the defendant himself, on the 9th day of July when he visited the house in the company of his lawyers and the deputy sheriff, said there was nothing missing that he could see. Now, is that evidence, some evidence—and there only has to be some substantial evidence—at this point we are not required that our case be proven beyond a reasonable doubt, but just that there is some [4988] substantial evidence for the jury to consider in this case.

Now, what have we here to tie up this defendant, Sam

Sheppard, with the commission of this crime? Have we some evidence, some substantial evidence for the jury to consider in that respect? I am not going to go over all the evidence, your Honor, but we do have the evidence of Don Ahern and his wife, Nancy, who visited Mr. and Mrs. Sheppard on the night of the 3rd of July at their home, and they had dinner there. And the Aherns left there at 12:30 a.m., right after midnight, the morning of July 4th. That's when they left.

Mrs. Ahern had locked the door leading out onto the porch, she had locked that door, put the chain on after they had cleared the table where they ate out on the porch. And when they left, Mrs. Sheppard went to the door leading out to the road, accompanied them to the door, bade them goodnight. When they left, Sam Sheppard was in the living room on a couch. He had on his trousers and shoes, he had on a white T-shirt and he had on a corduroy jacket as he lay there on the couch, and had on his [4989] wrist watch.

The Aherns left. When they left there was living in that house Marilyn Sheppard, Sam Sheppard and the son, Chip, who had been put to bed about ten o'clock at night.

In the morning Mayor Houk received a telephone call to come over, something had happened to Marilyn, and when he arrived there he and his wife—and that was about 10 minutes to six that that call came to him—when he arrived there, his wife went upstairs and found Marilyn lying in a pool of blood on her bed dead, horribly beaten. Sam Sheppard was in the study, or den, as they call it, sitting on the chair, slouched over on the chair. And then he told the story of some person being in there that night, and told this story of his hearing Marilyn call or scream or moan, in other words, some noise aroused him from his sleep as he slept there on the couch, and that he went upstairs and as he got upstairs—and he told a couple of versions of

this—some said that as he got up at the head of the stairs he was clobbered, and the story he told others was he went into the bedroom and there was a form in [4990] there and he was struck, and the next thing that he knew he came to and he saw something shiny on the floor, and it was a badge that he had in his billfold and his billfold was lying on the floor.

And then he heard a noise downstairs, and he went downstairs, through the living room and out on the back porch, or just leaving the back porch at the screen door—or the front door, it would be, he saw a form; and he chased that form down the steps down to the beach, and there grappled with that form. And he was knocked out again and came to with his legs stretched out in the water and lying on his face, and his body being wallowed back and forth by the waves, and that he then came up and went up to Marilyn's room and there took her pulse, and then later on called Mayor Houk. That's the story that he told the people.

Then when the authorities arrived there, what did they find? They find that the desk in the den there, all of the drawers are taken out of the desk and they are lying on the floor there. The contents are not out, but the drawers [4991] are lying on the floor. Marilyn's watch is lying on that floor in the den, also. And out in the living room, that desk in that room, it is open, the top of it is open, the drawers are pulled out, three or four of them are pulled out. The contents are not disturbed in the drawers and some of them—they are filled up, they are not disturbed. The photographs show they are full right up to the top, nothing disturbed in them, but there is a bundle of papers on the floor in front of this desk, a bundle of papers right there on the floor. At first hand, you would think that somebody had burglarized the place, and that was the intent, to have people believe that. Nothing was missing except the watch of Sam Sheppard, a key ring that he had—

or a chain, key chain with some keys on it and a ring belonging to him. Those are the articles that are missing.

And in the early afternoon of that same day was found on the bank, or over the bank in the shrubbery, in the weeds back of the house down towards the lake, in a little green bag was the watch of Sam Sheppard, this key chain [4992] and the ring. The watch had blood on it. Those articles were taken to the hospital where Sam Sheppard was, and he identified those articles and identified this green bag as being a bag that he had in his desk or had had in his desk in which he had tools for his outboard motor.

Later on it was analyzed—and by the way, that watch when it was found showed quarter after four, and it was stopped at quarter after four, and it was after one o'clock when they found it, but that is the time that was on it, and it started up later on in the day, started running again.

The blood on that watch was analyzed, and it was found to be human blood, and it couldn't be definitely determined as to its type, but it was definitely determined that there was an M factor there and that Marilyn's blood had an M factor. And in the study or den, there on the floor was found Marilyn's wrist watch and that had blood on it, and that was analyzed and found to be human blood with an M factor, one of the factors that Marilyn had in her blood. [4993] And it is interesting, if your Honor please, as to the watch of Marilyn Sheppard, and I will come to that in a few minutes, but first I want to talk about this green bag. While there was blood on the watch belonging to Sam Sheppard that was in that bag, there was no blood on that bag, that cloth bag, there was no blood, which can only mean one thing, if your Honor please: That the blood was dry on that watch when it was placed in that bag.

Now, let's take Marilyn's watch that she had been wearing. There are photographs here in the evidence in this case that show the wrist of Marilyn with blood marks

around her wrist, with the indentations of the band of her wrist watch, which means just this, your Honor: That that watch was on her long enough after that blood got on there to dry before the watch was taken off.

And then we have also found in that bedroom the pillow, and on that pillow, which was separated entirely from the blood portion on the bed, on that pillow are blood marks which distinctly show that there was some instrument that was lying on [4994] that pillow that was soaked with blood, because the imprint, the imprint of what Dr. Gerber calls a surgical instrument but which he says might be some other instrument of a similar shape, but that is clearly impressed on that pillow in blood, if your Honor please.

And that is of what significance, if your Honor please? It means that that death weapon, after it was used to pound the life out of that woman, must have been laid down on that pillow and remained there long enough for the blood to dry before it was removed. There can't be any question about that, if your Honor please.

[4995] Now, what does that mean in this case in the circumstantial factors in this case, if your Honor please? There was not an abrasion on Sam Sheppard with the injuries that he had. He had a bruise on the side of his face. He had a black eye, claimed he had an injury to his neck. There was no evidence of any abrasion or bruise there, according to Dr. Hexter, when he examined him that day, and this defendant tells you—he told the police when they did question him, told the Coroner when he questioned him at the inquest, that he had been clobbered. I believe he told one of them he thought with a fist in the back of the neck.

Can you conceive of a story of that kind in this case, if your Honor please, under these circumstances, that if there was another man there who had committed that crime of killing that woman, that Sam Sheppard, the only person who could possibly identify the murderer, would have been

let go with a clobbering in the back of his neck? That this person who was in that room with a weapon raining blows, death blows down on his wife, would not use the same instrument on him when he came up there in response to her cry for help [4996] on that morning?

No, he didn't show any evidence of being hit with a deadly instrument of any kind. And then when he heard a noise and he went downstairs and followed this form down on the beach and was knocked out again, there are no marks to show any blows, no marks at all outside of the black eye, no abrasions, and he is wallowing in the water with his face down, he told the authorities, and his body being wallowed back and forth by the waves.

Mrs. Houk testified that when she retired at 3 o'clock that morning, at 3 o'clock that morning when she retired—there is a concrete abutment in the rear of her house there on the lake, and the waves were pounding against that, she said, at that time, 3 o'clock that morning.

The fishermen down on the pier said that they had to leave there about 1:30 in the morning because the waves were coming over the pier.

Why, if this defendant was down in that lake as he told the police that he was, why, he would be drowned. The water would have been all over him.

And as he told Dr. Gerber when he testified at [4997] the Coroner's inquest, he couldn't identify the form, give any description of it, couldn't tell whether it was a man or a woman, a beast or a human being. He said he thought it had a hat on, and if it had a hat on, how could he tell it was a bushy-haired person. A phantom is what he was chasing, a phantom is what he was chasing.

I don't have any doubt but what he ran down on the beach and got in the water.

Oh, then, something is said that there is no evidence here—why, if he had been up there and had killed his wife,

he would be covered with blood. Why, his shoes would have had it on and his belt, yes, and his shirt, too, would have had it on. His shirt would have had it on, too. That T-shirt would have had it on. We know he wasn't wearing the jacket upstairs at that time because the jacket was neatly folded lying down on that couch downstairs. This man that rushes upstairs to help his wife stopped long enough to neatly fold the jacket and lay it down on that couch, and then go upstairs.

That shirt would have been covered with blood. The shoes not necessarily, because the [4998] person who had clobbered that woman would have been up close to the bed pounding her, and the blood wouldn't have gone down on his shoes that were alongside the bed, but the shirt, yes, it would have been covered, and that is why it is missing, that is why it is missing, because it was covered with blood.

Sure the walls were covered with blood. Every blow that was rained splattered blood, human blood out.

Is that sufficient evidence, if your Honor please, for this matter—this case to be submitted to the jury? These circumstances that we have here of this defendant's presence in that house, no property taken—no property taken—is this a burglary? No property taken, nothing disturbed outside of some drawers being pulled out. Why, they went to the extent of dumping some tools out of that green bag, to do what? To put a wrist watch, a ring and a key chain into it. Why, you could have put all of it in the watch pocket of your trousers. Why, it wasn't a handful, even, and they went to the extent of getting a bag and putting it in, and then this supposed burglar did [4999] what with this property? Why, he went outside 20 feet away from the house and threw it in the weeds, threw it in the weeds. Is that the act of a burglar, if your Honor please, or does that set up the act of a person who is trying to conceal and to deceive people because of the terrible act that he com-

mitted there himself? That is what we have in this case, if your Honor please.

It seems to me that when you consider all of the factors here, without going over all of the blood that was found in the house here—and they say, oh, well, that is nothing to that. The dog was the one that caused all that blood around there but, of course, there were some positive tests here that were made by some competent people who found that there was some of that blood, that where there was sufficient quantity to analyze, that in a precipitant test it showed that it was human blood, human blood, and some of that blood was taken from the risers, not on the step where a dog might drop it, but from the risers. Certainly the dog didn't pass any blood up against the riser, so that it was human blood that was there. A lot of it they couldn't determine whether it was human or animal [5000] blood, but there was sufficient quantity to know that someone went down those stairs with blood dripping from their hands, or from some instrument that they were carrying. There can't be any question about that, your Honor please.

Now, is that sufficient for a jury to draw reasonable inferences from to determine whether or not this defendant has been proven guilty beyond a reasonable doubt? It seems to me that the evidence here, while mostly circumstantial, if your Honor please, pretty near all of it circumstantial except the fact, the cold fact that the woman was cold beyond any doubt, and that is direct. There isn't any doubt. She certainly didn't commit suicide. She was killed at the hands of someone. That is direct, but most of the rest of it is circumstantial.

Why, when the police—they tried to shoo off this thing about attempting to cover this man up. Why, you remember Carl Rossbach. He didn't go there on the 4th of July. He didn't go there until the 5th, and he went to the hospital the 5th and wasn't permitted to talk to Sam

Sheppard by Steve and by Mr. Corrigan himself, who was there. He wasn't permitted. On the 6th he was not permitted [5001] to talk. On the 7th, he went there and was not permitted to talk. On the 8th he went there, and after quite a lot of trouble, quite a lot of trouble at the hospital there, was finally permitted to talk to the defendant in the hospital there. Oh, no, there wasn't any cover-up, there wasn't any trying to conceal this man at all from the authorities.

That evidence is in before your Honor, if your Honor please.

Now, it seems to me that when you consider all of that, that there certainly is plenty of evidence here to be submitted to the jury for them to determine whether or not this defendant is guilty or not guilty of this charge.

The Court: Mr. Mahon, I have one question: What do you say to Mr. Petersilge's statement or claim that all of this, serious as it all is, perhaps, in any view you take of it, could be equally as consistent with the innocence of Sam Sheppard as his guilt?

Mr. Mahon: Well, isn't that a question for the jury to determine, if your Honor please?

The Court: Well, that is a [5002] question that bothers the Court. That is why I put it to Mr. Petersilge. Isn't it perhaps for the jury to determine whether that is so?

Mr. Mahon: It is a question of fact. That is a question for a jury to determine.

The Court: All right. I have got your views.

Have you any more?

Mr. Petersilge: I would like to say just a couple of things very briefly, your Honor.

The Court: Sure.

Mr. Petersilge: Mr. Mahon referred to Dr. Hexter's testimony that there was no evidence of the injury at the back of Sam's neck—

The Court: No evidence of what?

Mr. Petersilge: No evidence of injury at the back of the neck here or the base of the brain.

I want to call your attention to Dr. Hexter's testimony at page 2919 of the record.

He says there, "Q. You say there was no injury to the base of the brain?

"A. I didn't say that. I said an injury to the forehead and not to the base of the brain.

[5003] "Q. I am asking you the question: Do you say there was no injury to the base of the brain?

"A. I don't mean it that way, Mr. Corrigan.

"Q. Well, will you answer the question? Was there or was there not an injury to the base of the brain?

"A. That is a question I can't answer because I only saw Sam once.

"Q. You don't know, then, is that your answer?

"A. No, sir, I don't know."

The Court: The court recalls what his testimony was very well.

Mr. Petersilge: Now, Mr. Mahon also spoke about the T-shirt, that the reason it was missing is because it was soaked in blood.

Well, your Honor, whether the blood would have been below the knee or not may have been a question where the man was standing, but there is no question about it that the blood would have been above the—would have been on the trousers above the knee, and those trousers show definitely that there was no blood spot sufficient as would have come from the spraying of the blood that was caused by the blows.

[5004] Now, Mr. Mahon had nothing to say about that.

So far as the blood on Sam's watch, and the blood on Marilyn's watch being dry, there is no evidence in the

record as to how long it takes blood to dry, but in the absence of such evidence, the jury can't be allowed to speculate—

The Court: Oh, I think that Dr. Gerber—

Mr. Mahon: There is evidence. Dr. Gerber testified to that.

The Court: That it dried very rapidly when it is exposed to air.

Mr. Mahon: From five to twenty minutes is the testimony.

The Court: There was an element of time testified to.

Mr. Petersilge: Yes. I think it depends on how thick the layer of blood was and what the conditions were.

The Court: That is right, and when you expose it to the air, in particular, yes.

Mr. Petersilge: Yes, but the idea that Marilyn—that the picture shows that there was very little blood on her wrist, the idea that her watch might not have been dried within the time [5005] that Sam was struggling with this man, or that the same man who struck him down was taking off Sam's watch and the key chain and ring, that is purely speculative.

The Court: Well, I think Mr. Mahon—I don't think it is worth the time here now. Mr. Mahon merely referred to that fact as some evidence that the blood was dry because the blood did not get onto the bag after its insertion.

Mr. Mahon: No, if your Honor please. As far as her watch is concerned, the blood was dry on her hand with the imprint of the band of the watch on it.

The Court: Oh, yes. That is Marilyn's watch?

Mr. Mahon: That's right.

Mr. Petersilge: Yes.

Mr. Mahon: The imprint is still on there. It must have been on there until it dried.

The Court: Yes, I have got that.

Mr. Petersilge: Yes, your Honor, I intended to refer to that, but meant that it wasn't necessarily a long time that the watch had been there [5006] before it dried sufficiently when that was taken out.

The Court: What he infers is that the entire picture on that issue does disclose that the blood had dried before the watch was removed from the wrist. That was the claim made.

All right. I think we have got that.

Now, 9:15 tomorrow morning. The Court wants to sleep over this matter now. This is not easy, and I hope we will be able, if we decide to go further, to go right ahead at 9:15. The Court may want some little time, he may not, and, of course, if we dispose of it that will end that, and having one or two people here will not be any great inconvenience, so I would like you to be prepared, if we are ready to go, at 9:15 tomorrow morning.

* * *

(Thereupon at 4:40 o'clock p.m. an adjournment was taken to 9:15 o'clock a.m., Thursday, December 2, 1954, at which time the following proceedings were had):

[5007] *Thursday Morning Session, December 2, 1954*

(9:15 o'clock, a.m.)

(Thereupon, the following proceedings were had in the absence of the jury:)

The Court: Gentlemen, due to the tendency that always exists, among the laymen at least, to deem anything that the Court says about the evidence in a case, or about the remarks of counsel directed to that evidence, as some expression or at least suggestion that the Court has formed some opinion as to what the facts really are, of course, this case and in this connection at the moment the Court has no obligation whatever, nor even right, to even consider the

weight of the facts in this case nor to express any opinion or, in fact, have any opinion as to the guilt or innocence of the defendant. And for that reason the Court will not comment whatever upon the motions nor upon the remarks to them, splendid as they were. But the Court feels that at this stage of the record this case is not one that can be disposed of by the Court as a matter of law, and for that [5008] reason the three motions will be separately overruled and exceptions noted to each separately.

I would like to say to counsel that I have here the original report of the autopsy and the copy for introduction. Will you be kind enough to see that the original comes back to me?

(Thereupon, a discussion was had off the record, after which the following proceedings were had:)

The Court: May we agree that the record may be corrected so that it makes no difference which way you construe them, that all motions made on yesterday are separately overruled and exception noted as to each separately?

Mr. Petersilge: I think the motions which Mr. Mahon refers to as numbers 3, 4, 5 and 6 were all comprised within the motion which I stated as motion number 3.

The Court: That was my conception.

Mr. Mahon: Oh, no. They were all separately stated.

The Court: All right.

* * *

THE YEARS WERE GOOD

by Louis B. Seltzer
INTRODUCTION BY BRUCE CATTON
THE WORLD PUBLISHING COMPANY
Cleveland and New York

CHAPTER 26

On the morning of July 4, 1954, Mrs. Mrs. Marilyn Reese Sheppard, a pretty Bay Village housewife, was found bludgeoned to death in her bedroom.

For mystery, for suspense, for painstaking putting together of fragmentary clews by the most scientific methods, the Sheppard murder, which was to become one of the country's most famous in modern times, had within it all of the elements of the classic criminal case.

It had one other element, which set it apart from most murder cases of this type. That was the deliberate effort to prevent the law enforcement authorities from finding the killer. The case became both a murder and, in a very real sense, a roadblock against the law.

At the time Marilyn Reese Sheppard was brutally killed, only two other persons were present in the quiet lakefront home, settled among big trees a comfortable distance away from the roadway. One of these was Dr. Samuel H. Sheppard, her husband, a young, handsome, athletic osteopath, and, the other, the Sheppards' sleeping son Chip, aged six.

Bay Village is a tightly knit community to the west of Cleveland. It is composed largely of young people who either have their own businesses, are fairly well established in the profession, or have a competence. It is a community of beautiful homes, peaceful and quiet, but socially vivacious. Families visit back and forth in the easy, relaxed, and buoyant way common to newly created small communities with a youthful flavor. They are very loyal to one another when any form to trouble occurs.

The family of Dr. Sam Sheppard owned a large osteopathic hospital in the village. His father and brothers operated it, with Sam Sheppard, of course, also on the staff.

It was the Sheppard family's hospital that Dr. Sam was taken by his family immediately after the murder of his wife was reported. The reason given for hospitalizing him was that an intruder—a bushy-haired man, as Dr. Sam described him—had injured his neck in the struggle the Doctor reported had taken place in the house. Thus, the Sheppard family surrounded Dr. Sam.

The investigating authorities were blocked off. The Mayor of Bay Village was J. Spencer Houk, who owned the local butcher shop and was a close friend of Dr. Sam. They visited back and forth; they went on vacations together; they owned a boat together. Mayor Houk rejected the advice of Coroner Sam Gerber and the Cleveland Homicide Squad that Dr. Sam should be arrested.

Dr. Sam was fenced in by his family, his friends, and the public authorities in Bay Village. The protective wall had been put up quickly. It was almost impossible to penetrate it, and then only at the will of those who controlled the encirclement—and on their terms. The purpose seemed obvious—to hold the wall secure around Dr. Sam until public interest subsided, and the investigating authorities turned their attention elsewhere.

The newspapers began to lose interest—except one. The Press kept the Sheppard murder case in top position on Page One. It kept steadily prying into the case, asking questions, trying to break through the wall around Dr. Sam.

On July 15, eleven days after Marilyn Reese Sheppard's badly beaten body had been found in the bedroom of their home, I addressed a list of eleven questions to Dr. Sam and his lawyers—one of whom was a prominent criminal lawyer hired by the Sheppard family the very morning Marilyn's body had been found.

Dr. Sam's reply was published on July 17. The answers were noninformative and inconclusive. The situation was just as tight, just as completely roadblocked, just as walled in as before.

On July 20, with the investigation lagging, with the Coroner still fended off by the family and Bay Village friends and officials. The Press published on Page One an editorial. It took the upper quarter of the page, and the eight-column heading said: "Somebody Is Getting Away With Murder."

It was a calculated risk—a hazard of the kind which I believed a newspaper sometimes in the interest of law and order and the community's ultimate safety must take. I was convinced that a conspiracy existed to defeat the ends of justice, and that it would affect adversely the whole law-enforcement machinery of the County if it were permitted to succeed. It could establish a precedent that would destroy even-handed administration of justice.

Because I did not want anyone else on The Press staff to take the risk, I wrote the editorial myself. It may not have been a good editorial, but it was a hard-hitting editorial. It was intended to be. It read in part:

> What's the matter with the law enforcement authorities of Cuyahoga County?
>
> Have they lost their sense of reason?—or, at least inexcusably, set aside the realization of what they are hired to do, and for whom they work?
>
> If ever a murder case was studded with fumbling, halting, stupid, incooperative bungling—politeness to people whose place in this situation completely justified vigorous searching, prompt and effective police work—the Sheppard case has them all.
>
> Was the murder of Mrs. Sheppard a polite matter?
>
> Did the killer make a dutiful bow to the authorities

and, then, proceed brutally to destroy the young child-bearing wife?

Why all of this sham, hypocrisy, politeness, criss-crossing of pomp and protocol in this case?

Who is trying to deceive whom?

From the very beginning—from the first hour that the murder became known to the authorities by a telephone call from the husband to the Town Mayor—from that moment on, and including this, the case has been one of the worst in local crime history.

Of course, the trial is cold. Of course, the clews have been virtually erased by the killer. Of course, the whole thing is botched-up so badly that head or tail cannot be made of it.

In the background of this case are friendships, relationships, hired lawyers, a husband who ought to have been subjected instantly, to the same third-degree to which any other person, under similar circumstances, is subjected, and a whole string of special and bewildering extra-privileged courtesies that should never be extended by authorities investigating a murder—the most serious and sickening crime of all.

The spectacle of a whole community watching a batch of law enforcement officials fumbling around, stumbling over one another, bowing and scraping in the presence of people they ought to be dealing with just as firmly as any other persons in any other crime—that spectacle is not only becoming a stench, but a serious threat to the dignity of law enforcement itself.

Coroner Sam Gerber was never more right than when yesterday he said that the killer must be laughing secretly at the whole spectacle—the spectacle of a community of a million and a half people brought to indignant frustration by Mrs. Sheppard's killer in that white house out in Bay Village.

Why shouldn't he chuckle? Why shouldn't he cover up, shut up, conceal himself behind the circle of protecting people?

What's the matter with us in Cuyahoga County? Who are we afraid of? Why do we have to kow-tow to a set of circumstances and people where a murder has been committed?

It's time that somebody smashed into this situation and tore aside this restraining curtain of sham, politeness, and hypocrisy, and went at the business of solving a murder—and quit this nonsense of artificial politeness that has not been extended to any other murder case in generations.

The evening this editorial was published in The Press on Page One, the Bay Village City Council met and voted to take the investigation away from their own police force and hand it over to the Cleveland Police Department's Homicide Squad.

The next day, also on Page One The Press published an editorial headed: "Why No Inquest? Do It Now Dr. Gerber."

Why hasn't County Coroner Sam Gerber called an inquest into the Sheppard murder case?

What restrains him?

Is the Sheppard case any different from the countless other murder mysteries where the Coroner has turned to this traditional method of investigation?

An inquest empowers use of subpoena.

It put the witnesses under oath.

It makes possible the examination of every possible witness, suspect, relative, record and papers available anywhere.

It puts the investigation itself into the record.

And—what's most important of all—sometimes solves crimes.

What good reason is there now for Dr. Gerber to delay any longer the use of the inquest?

The murder of Marilyn Sheppard is a baffling crime.

Thus far, it appears to have stumped everybody.

It may never be solved.

But this community can never have a clear conscience, until every possible method is applied to its solution.

What, Coroner Gerber, is the answer to the question—

Why don't you call an inquest into this murder?

A few hours after this editorial appeared on Page One of The Cleveland Press, Coroner Gerber ordered an inquest.

At the inquest, Dr. Sam insisted his married life had been a happy one. He denied an "affair" with a former Bay Village Hospital technician now living in California. The Press flew a reporter to Los Angeles with the police. The technician was brought back to Cleveland. She admitted her affair with Dr. Sam, and related talks she had with Dr. Sam about a possible marriage.

The wall still surrounded Dr. Sam. He had gone back to the family-operated hospital.

On July 30, the Cleveland Press published, again spread across the top of its first page, another editorial. This one was headed: "Quit Stalling—Bring Him In." Once more I wrote it myself. It was my neck I was sticking out.

Maybe somebody in this town can remember a parallel for it. The Press can't.

And not even the oldest police veterans can, either.

Everybody's agreed that Sam Sheppard is the most unusual murder suspect ever seen around these parts.

Except for some superficial questioning during Sam Gerber's inquest, he has been scot-free of any official drilling into the circumstances of his wife's murder.

From the morning of July 4, when he reported his wife's killing, to this moment, twenty six days later, Sam Sheppard has not set foot in a police station.

He has been surrounded by an iron curtain of protection that makes Malenkov's Russian concealment amateurish.

His family, his Bay Village friends—which include its officials—his lawyers, his hospital staff, have combined to make law enforcement in this County look silly.

The longer they can stall bringing Sam Sheppard to the police station the more surer it is he'll never get there.

The longer they can string this whole affair out the surer it is that the public's attention sooner, or later, will be diverted to something else, and then the heat will be off, the public interest gone, and the goose will hang high.

This man is a suspect in his wife's murder. Nobody yet has found a solitary trace of the presence of anybody else in the Lake Road house the night or morning his wife was brutally beaten to death in her bedroom.

And yet, no murder suspect in the history of this County has been treated so tenderly, with such infinite solicitude for his emotions, with such fear of upsetting the young man.

Gentlemen of Bay Village, Cuyahoga County, and Cleveland, charged jointly with law enforcement—

This is murder. This is no parlor game. This is no time to permit anybody—no matter who he is—to outwit, stall, fake, or improvise devices to keep away from the police or from the questioning anybody in his right mind knows a murder suspect should be subjected to—at a police station.

The officials throw up their hands in horror at the

thought of bringing Sam Sheppard to a police questioning for grilling. Why? Why is he any different than anybody else in any other murder case?

Why should the police officials be afraid of Bill Corrigan, his lawyer? Or anybody else, for that matter, when they are at their sworn business of solving a murder?

Certainly, Corrigan will act to protect Sam Sheppard's rights. He should.

But the people of Cuyahoga County expect you, the law enforcement officials, to protect the peoples rights.

A murder has been committed. You know who the chief suspect is.

You have the obligation to question him—question him thoroughly and searchingly—from beginning to end, and not at his hospital, not at his home, not in some secluded spot out in the country.

But at Police Headquarters—just as you do every other person suspected in a murder case.

What the people of Cuyhoga County cannot understand, and The Press cannot understand, is why you are showing Sam Sheppard so much more consideration as a murder suspect than any other person who has ever before been suspected in a murder case.

Why?

That night doctor Sam was arrested on a murder charge and taken to Police Headquarters.

The rest of the Sam Sheppard case is familiar. He was indicted by the Grand Jury, tried in a courtroom crowded with newspaper, radio, and television representatives from all over America, convicted of second degree murder, and sentenced to the Ohio Penitentiary, where he is now a prisoner.

The Cleveland Press was both applauded and criticized. It was criticized on the ground that The Press inflamed

public opinion by its persistent and vigorous pounding away at the case. It was criticized by some who expressed the belief that the Sheppard case had been "triad" in the newspapers before it reached the courtroom.

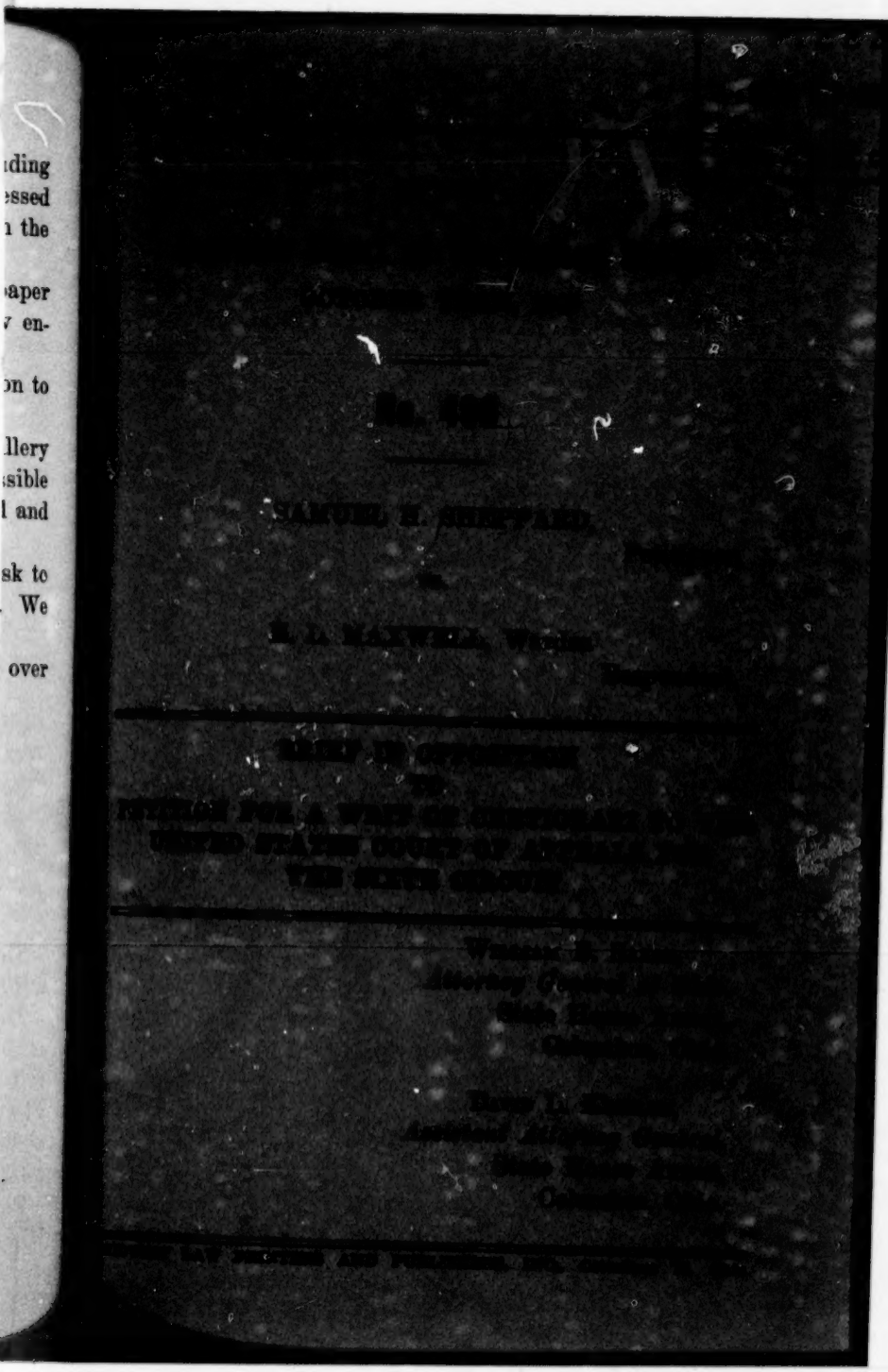
The question confronting The Press, as a newspaper properly concerned about the whole structure of law enforcement in the community, was—

Shall we permit a protective wall to shield a solution to this murder, by saying and doing nothing, or—

Shall we move in with all of our editorial artillery in an effort to bring the wall down, and make it possible for law enforcement authorities to act in their normal and accustomed way?

There were risks both ways. One represented a risk to the community. The other was a risk to The Press. We chose the risk to ourselves.

As Editor of The Press I would do the same thing over again under the same circumstances.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 490

SAMUEL H. SHEPPARD,

Petitioner,

vs.

E. L. MAXWELL, Warden,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF THE CASE

The United States Court of Appeals for the Sixth Circuit has set out in its opinion such a direct, concise and accurate statement of the case that respondent does not feel it necesary to attempt to improve upon it. Therefore, for its Statement of the Case, respondent sets forth below the statement of the case made by the Court of Appeals.

"Appellant, Warden of the Ohio State Penitentiary, appeals from a United States District Court order declaring void the 1954 conviction of petitioner, Dr. Samuel H. Sheppard. Judgment had been entered in the Court of Common Pleas of Cuyahoga County, Ohio, upon a jury verdict convicting Sheppard of the second-

degree murder of his wife.[1] Upon his appraisal of trial and pretrial publicity and other matters, the District Judge concluded that Dr. Sheppard did not have a fair trial and was thus deprived of rights guaranteed him by the United States Constitution. His order granted bail to Dr. Sheppard and released him from the Ohio Penitentiary where he had been confined under a life sentence since his conviction in 1954. Ohio was granted 60 days within which to take further action against Dr. Sheppard. *Sheppard v. Maxwell*, 231 F. Supp. 37 (July 15, 1964). This Court has stayed the order fixing such time limitation.

"Sheppard's conviction and the denial of his motion for new trial on grounds of newly discovered evidence were both affirmed on appeal by the Court of Appeals for Cuyahoga County, Ohio. *State v. Sheppard*, 100 Ohio App. 345, 128 NE (2) 471 (1955); *State v. Sheppard*, 100 Ohio App. 399, 128 NE (2) 504 (1955). The Ohio Supreme Court dismissed an appeal from the decision affirming the denial of a new trial in *State v. Sheppard*, 164 Ohio St. 428, 131 NE (2) 837 (1956), and affirmed the conviction in *State v. Sheppard*, 165 Ohio St. 293, 135 NE (2) 340 (1956), two judges dissenting. Application for certiorari was denied by the United States Supreme Court, *Sheppard v. Ohio*, 352 U.S. 910, 1 L. Ed. (2) 119 (1956), and rehearing was denied, *Sheppard v. Ohio*, 352 U.S. 955, 1 L. Ed. (2) 245 (1956). Dr. Sheppard's later petition to the Supreme Court of Ohio for a writ of habeas corpus was denied, *State, ex. rel. Sheppard v. Alvis*, 170 Ohio St. 551, 167 NE (2) 94 (1960). Dr. Sheppard thus has had the benefit of all the processes of law provided by the State of Ohio, and

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[1] Marilyn Sheppard, petitioner's pregnant young wife, was bludgeoned to death in the bedroom of her lakeshore home during the early morning hours of July 4, 1954. Dr. Sheppard told police that he had been wakened from his sleep on a couch in the downstairs living room by a noise or cry from upstairs, ascended the stairs, and was knocked unconscious while grappling with an unidentifiable white "form" standing next to his wife's bed. He further stated that upon recovering, he pursued the form out of the house, to be again knocked out while struggling on the shore. The evidence disclosed that Dr. Sheppard had recently been unfaithful to his wife.

the United States Supreme Court did not see fit to take the case for its review.

"The habeas corpus proceeding here involved was commenced in the United States District Court April 11, 1963, charging, as amended, some 23 separate constitutional defects in Sheppard's conviction. Some of these had already been found without merit by the Ohio Courts and others were new. Indicating his view that there were probably other constitutional imperfections in Dr. Sheppard's trial, the District Judge bottomed his decision on four separate grounds, (1) newspaper publicity before and during the trial denied Sheppard a fair trial, (2) the trial judge should have disqualified himself, (3) evidence that Sheppard had refused to take a lie detector test and that another witness had taken such a test was improperly brought before the jury, and (4) the bailiffs in charge of the jury after the cause was submitted to it improperly allowed individual jurors to make telephone calls to their families. Grounds 1 and 4 were passed upon in the Ohio Court of Appeals and Supreme Court and were found to be without merit. They were also relied upon in the application to the United States Supreme Court for certiorari, which was supported by the same volumes of newspaper publicity as are before us. Ground 2 and part of ground 3 were first asserted in the instant petition for habeas corpus." (Rs. 1-3)

The United States Court of Appeals for the Sixth Circuit felt that the release of petitioner was improvident and therefore vacated the order of the District Court and remanded petitioner to the custody of the respondent Warden of the Ohio Penitentiary, Columbus, Ohio, on May 5, 1965. Petitioner filed a motion for rehearing *en banc* on June 11, 1965 and a petition for rehearing on the same day. Both the motion for rehearing *en banc* and the petition for rehearing were denied on July 14, 1965 with one judge dissenting. (Rs. 111-113) On July 26, 1965, the Court of Appeals entered an order staying the mandate and petitioner's petition for writ of certiorari was filed herein on August 24, 1965.

SUMMARY OF ARGUMENT

Petitioner has presented four "reasons" why the Court should grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review eleven Questions Presented in his petition. All but three of the Questions Presented were issues considered by both courts below. The last three Questions Presented are issues concerning the sufficiency of the Court of Appeals' review of this case. These last three issues have been fabricated out of the petitioner's own mind because in them he clearly mistakes the true holding of the Court of Appeals. Not only do these last three questions miss the point made by the Court of Appeals, if the holding they presume did in fact exist, petitioner would still have failed to present "special and important reasons" why the Court should grant certiorari as required by its Rule 19. Furthermore, the other Questions Presented were considered and decided as issues before both courts below. Petitioner fails to state wherein there lies and in what particulars there exist "special and important reasons" of the character set forth in Rule 19 why the court should grant certiorari. Petitioner fails to do this because there do not exist "special and important reasons" for granting certiorari.

The crucial difference between the decisions of the two courts below, although not the only difference, is in their view of the facts constituting the circumstances which surrounded the Sheppard trial. The District Court viewed them as such untoward circumstances as to justify a presumption of prejudice while the Court of Appeals held them to be strictly liable to the general rule requiring a showing of identifiable prejudice before the constitutional infirmity may vitiate the conviction of an accused. In essence, respondent contends that the petitioner has failed to present

"special and important reasons" why certiorari should be granted because such reasons simply do not exist. Further, respondent contends that the special facts of the Sheppard trial are far from being of a character which this Court has previously found to be inherently suspect and thereby susceptible of a presumption of prejudice. Petitioner has not sustained his burden of showing some identifiable prejudice which would support a finding that his trial and conviction was void. The petition for a writ of certiorari should be denied.

ARGUMENT

I. Introduction: PETITIONER HAS BEEN ACCORDED MORE THAN A FULL AND FAIR REVIEW OF THE CONSTITUTIONALITY OF HIS TRIAL.

Respondent strongly urges that this Court should not grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit for the reasons that (1) petitioner has not *presented* any "special and important reasons" [1] for which the Court should grant certiorari and (2) there do not *exist* any "special and important reasons" for which the Court should grant certiorari. Respondent's argument will be confined to these two reasons in opposition to the granting of the writ. Review or argument of the merits is herein unnecessary, indeed inappropriate, except insofar as is necessary to clearly illumine the lack of "special and important reasons" in this case for the granting of the writ.[2]

Although petitioner claims a number of violations of his constitutional rights, the fundamental issue presented (Ra 403a) and most intensively briefed and argued to the courts below as well as to the courts of Ohio is the question of whether or not the publicity before and during the trial of petitioner so enveloped and pervaded the trial proceedings as to prejudicially influence the judge, jury, and prosecution, thereby denying petitioner his constitutional right to a fair trial in accordance with fundamental due process requirements of the Fourteenth Amendment to the Constitution of the United States.[3] It is this question, along with

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[1] Rule 19 (1), Rules of the Supreme Court of the United States.

[2] For the sake of uniformity and convenience to the Court, respondent will adopt the method of reference to the trial transcript, record, and opinions below, used by the petitioner and set forth in the petition for certiorari at page two, footnote one thereof. Reference to the Petition for Writ of Certiorari will be made by reference to the appropriate page number preceded by the abbreviation "Pet."

[3] Petitioner's Questions Presented numbers 1. through 5. and argued in part I of petitioner's Argument.

the other of petitioner's Questions Presented, except for those numbered six, nine, ten, and eleven (Pet. 2 & 3),[4] which petitioner previously presented to this Court during the October Term, 1956[5] in a petition for writ of certiorari to the Supreme Court of Ohio to consider the latter's review on appeal. That petition for certiorari was denied. *Sheppard v. Ohio,* 352 U.S. 910, 1 L. Ed. 2d 119, 77 S. Ct. 118 (1956); rehearing denied 352 U.S. 955, 1 L. Ed. 2d 245, S. Ct. 323 (1956).

Respondent is fully aware that denial of a petition for writ of certiorari in no way implies consideration of or an opinion on the merits of the case. However, as has been pointed out by the Court frequently and specifically by Mr. Justice Frankfurter in his memorandum filed with the denial of certiorari in *Sheppard v. Ohio, supra,* 910, denial of a petition for writ of certiorari does mean ". . . that for one reason or another this case did not commend itself to at least four members of the Court as falling within those considerations which should lead this Court to exercise its discretion in reviewing a lower court's decision." Respondent further realizes that he is referring to a denial of certiorari by this Court almost ten years ago. Had the passage of time between then and now so altered the circumstances surrounding the trial and the questions presented by the current petition for certiorari, or had the law applicable to the merits of the case not been illumined by decisions of this Court and/or had it changed during these ten years, *Sheppard v. Ohio, supra,* would be totally immaterial to the present application. This, however, is not so and the Court of Appeals recognized this when it said: "The main points

[4] Assertions, statements of fact, and arguments contained in this introductory discussion are not intended at this point to refer to these new questions. They will be discussed at a later point in this brief.

[5] Case No. 352.

earnestly pressed upon the District Judge and this Court are not the belated discovery of Dr. Sheppard's present counsel." (Rs. 8) Circumstances surrounding the trial and the questions now presented obviously have not changed one iota. Neither has there been presented any new, different, or additional facts which would alter the implications of these circumstances *except* for the fact that after ten years the circumstances are not fresh at hand and are easily enlarged out of proportion to their actual significance. In fact, the copies of newspaper articles and pictures of the courtroom included in the appendix to the petition now before the Court are the exact same selections of newspaper articles and pictures which appeared in the appendix to the petition for certiorari before the Court during its October Term, 1956.

Further, in 1956, along with the other claims of constitutional violations previously noted, "The defendant claimed that a proceeding so infused and enveloped by the 'atmosphere of a "Roman Holiday" ' precluded a fair trial and could not but deprive him of the due process of law guaranteed by the Fourteenth Amendment of the Constitution." *Sheppard v. Ohio, supra*, 910. All of the claimed violations of his constitutional rights the petitioner now urges upon the Court with the exception of alleged lack of impartiality of the trial judge (Questions Presented 6, pet. 2) and the alleged failure of the Court of Appeals to adequately and properly review the decision of the District Court (Questions Presented 9, 10, 11, Pet. 3), were presented to the Court in 1956.

The law applicable to these questions has not changed nor has the application of that law by other decisions of this Court so altered the significance of the special facts in this case as to provide "special and important reasons" for which certiorari should be granted. The latter proposition

is argued more fully in part II B. of Respondent's Argument. Suffice it to say here that the basic reason the Court of Appeals reversed the decision of the District Court is that the District Court improperly applied the law relevant to the merits of the case. That law consists of a rule announced in *Stroble v. California*, 343 U.S. 181, 96 L. Ed. 872, 72 S. Ct. 599 (1952) requiring the petitioner to maintain his burden of proof by a showing of identifiable prejudice which denied him a fair trial and an exception to that rule announced in *In Re Murchison*, 349 U.S. 133, 99 L. Ed. 942, 75 S. Ct. 623 (1955) under which, because of the untoward circumstances presented, prejudice will be presumed without such a showing. Both of these cases were decided *before* petitioner presented his petition for certiorari in *Sheppard v. Ohio, supra.*

The character of "special and important reasons" for which the Court will grant certiorari are the same now as they were in 1956. The passage of time has not altered the facts and circumstances, evidence, the questions presented, or the law applicable to the merits. Nevertheless, without setting forth any "special and important reasons", despite the fact that none exist, and despite the fact that not even four members of the Court in 1956 could find such in relation to most of his present claims, petitioner still continues to seek review of a case which has been before every state and federal court with jurisdiction over the subject matter at least once and often two or three times. Respondent maintains that petitioner has had more than a full and fair review of his trial and that the litigation which has continued almost without abatement for over ten years should now come to an end with a denial of the present petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

II. PETITIONER HAS NOT *PRESENTED* AND THERE DO NOT *EXIST* ANY "SPECIAL AND IMPORTANT REASONS" WHY THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT TO REVIEW QUESTIONS PRESENTED BY THE PETITIONER.

A. PETITIONER HAS FAILED TO *PRESENT* ANY "SPECIAL AND IMPORTANT REASONS" WHY A WRIT OF CERTIORARI SHOULD BE GRANTED TO REVIEW HIS QUESTIONS PRESENTED.

(1) "1. *Did the pre-trial publicity in petitioner's case so prejudice the community that no fair and impartial jury could have been impanelled?*

"2. *Did the trial judge fail to adequately protect the petit-jury, once impanelled, from prejudicial extrinsic influence?*

"3. *Did the trial judge fail to adequately interrogate the jurors when they had been exposed to prejudicial extrinsic matter through the news media during trial?*

"4. *Did the trial judge fail to maintain constitutionally adequate decorum in the courtroom during trial?*

"5. *Did the trial judge deny petitioner a public trial by assigning nearly all of the seats in the courtroom to newsmen?*

"6. *Did the trial judge, in the special circumstances of this case, violate petitioner's constitutional right to a fair and impartial judge by failing to recuse himself despite his firm belief,*

undisclosed to petitioner, that petitioner was 'guilty as hell' and that the case against him was 'open and shut'?

"7. Did the trial judge violate petitioner's federal constitutional right against self-incrimination by receiving evidence that petitioner had refused to take a lie detector test and truth serum?

"8. Did the action of the bailiffs who permitted jurors to telephone outsiders during the course of deliberations in violation of Ohio Law violate petitioner's federal constitutional right to a fair and impartial trial?"

In relation to the above questions,[6] petitioner has failed to present any "special and important reasons" for the granting of the writ.[7] Paragraph one of Rule 19, Rules of the Supreme Court of the United States provides that "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." The same

[6] Argued in parts I through IV of petitioner's Argument (Pet. 14-35)

[7] Petitioner outlines his argument on page 14 of the petition stating there that "We will deal first with those questions confronted by the District Court and the Court of Appeals; [parts I through IV of petitioner's argument] second with those alleged constitutional violations noted but not considered by the District judge and summarily rejected by the Court of Appeals; [part V of the petitioner's argument] and third with *failure of review described above.*" Respondent interprets the italicized portion to relate to the third "reason", the later appearing in the paragraph immediately preceding the italicized portion. By process of elimination, the third "reason" must then have reference to the remaining parts VI and VII of petitioner's argument. (Note also that petitioner's petition for rehearing in the Court of Appeals, Part V is similarly entitled at page 45 thereof "Total Failure of Review: The Sufficiency of the Evidence.") However, since Part V also deals with this matter of proper review, Respondent includes Part V as though referred to by the third "reason."

rule continues in subparagraphs (a) and (b) to indicate the kind of "special and important reasons" for which the Court will grant the issuance of the writ. Subparagraph (a) dealing with review of state court decisions is inapplicable here. Subparagraph (b) pertains to a review of decisions of the federal courts of appeal. Further, paragraph 1. (b), Rule 23, Rules of the Supreme Court of the United States, directs that the petition for writ of certiorari contain "A direct and concise argument amplifying the *reasons* relied on for the allowance of the writ. See Rule 19." (Emphasis added) Petitioner has failed to present any "special and important reasons" in his argument for the granting of a writ of certiorari. The petitioner's reasons for granting the writ are as follows:

> ". . . this trial was . . . a 'mockery of justice' and ought not to be allowed to permanently stain the record of American jurisprudence.
>
> ". . . there are numerous individual violations of the federal constitution which cannot now be vindicated without action by this Court.
>
> ". . . the reviewing process in the Court of Appeals fell far short of that required by current habeas corpus decisions of this Court; . . .
>
> ". . . the conduct of prosecuting officials and newsmen which the Court of Appeals now condones was so flagrant and abusive that the stamp of approval they now enjoy should be eradicated." (Pet. 14)

Comparing the first, second, and fourth of the above "reasons" with the character of reasons set forth in paragraph 1. (b), Rule 19, governing review on certiorari, it becomes obvious that petitioner does not claim in these three "reasons" that the decision of the Court of Appeals (1) is in conflict with the decisions of other courts of appeal on the same matter, or (2) that it presents a conflict with applicable state or territorial law, or (3) that it has decided

a question of importance not heretofore decided by this Court, or (4) that it has decided the federal questions presented in a way which conflicts with applicable decisions of this Court, or (5) that it so far departs from the accepted judicial procedure as to call upon this Court's power of supervision over the lower federal courts. The first, second, and fourth "reasons" given by the petitioner suggest that petitioner is merely attempting to gain another opportunity to argue the merits of this case before the Court without any "special and important reasons" for doing so. That this is true is evidenced by petitioner's Argument.

That Argument consists entirely of a discussion of the merits of the questions already given full and fair adjudication in the Courts below and fails to present a "direct and concise argument amplifying the reasons relied on for the allowance of the writ" in conformity with Rule 19, Rules of the Supreme Court of the United States. A quick review of petitioner's Argument, parts I through IV, will readily indicate his failure to cite compelling reasons for granting the writ. Parts V through VII will be discussed in more detail later.

"I. THE PUBLICITY AND CONTROL OF THE COURT-ROOM AND JURY"

"A. *The Pretrial Publicity*" (Pet. 14-19)

Following an argument of the merits and review of the newspaper publicity petitioner concludes with:

> "The District Court had adequately set forth enough of the publicity before trial to warrant a conclusion that the Cleveland community was in no condition to furnish a jury sufficiently impartial to reach minimum standards of due process. Additional material contained in the green scrapbooks reinforces this position very soundly. We submit that the Court of Appeals was in error in rejecting as clearly erroneous the District

> Judge's finding of fact, and that examination of the matter by this Court warrants granting the writ." (Pet. 19)

Petitioner has said nothing other than to reiterate the conclusion of the District Court, submit that he agrees therewith, and that he thinks the Court of Appeals was wrong. Petitioner does not give the slightest hint of the particulars in which he considers the Court of Appeals erred and which errors are of a character sufficient in importance to be reviewed by this Court. Petitioner obviously does not comprehend just what prompted the Court of Appeals to reverse the District Court, a point which will be discussed in part II. B. of respondent's Argument.

"B. *Publicity During the Trial*" (Pet. 19-26)

Again, after argument of the merits and a review of the Court's decision in *Estes v. Texas*, ... U.S. ..... (1965) 33 U.S.L. Week 4543 (June 7, 1965) in regard to those merits, petitioner simply states:

> "We do not repeat those instances [alleged violations of constitutional rights] here, but we respectfully suggest that they show beyond question that the trial court's handling of the entire matter was woefully inadequate, and operated to deprive petitioner of a fair trial."

Again, as pointed out in relation to petitioner's Argument I.A. above, there is no indication here that petitioner urges that the Court of Appeal's decision conflicted with decisions of other courts of appeal, that its decision is not in conformity with the decisions of this Court, or is in any other way not in accordance with accepted law and procedure applicable.

Without belaboring the point and since a reading of the petition for certiorari by the Court will readily disclose that the other of petitioner's Arguments are infected with

the same vice, respondent simply reiterates that petitioner has failed to *present* any "special and important reasons" why the Court should grant certiorari.

The third of the above listed "reasons" of petitioner relates to his Questions Presented numbers nine, ten, and eleven. (Pet. 3) [8] Respondent will argue, in numerical order, the failure of the petitioner to present "special and important reasons" why the Court should review on certiorari these questions.

(2) "9. *Did the court below deprive petitioner of proper review of other claimed constitutional violations?*" [9]

The District Court indicated clearly (Ra. 404a & 476a) that its decision was based upon a consideration of only part of the twenty-three stipulated issues. (Ra. 398a-401a) Respondent appealed the decision of the District Court basing its argument upon the erroneous finding of facts and conclusions of law made by the District Court in relation to those stipulated issues considered by that Court. Petitioner was obviously apprised of this fact by respondent's brief in the Court of Appeals and admitted the knowledge thereof in his own brief in that Court.[10] Yet, petitioner did not argue the other claimed constitutional violations in his brief before the Court of Appeals, but stated therein ". . . that to the extent these additional issues may be entitled to *some* consideration, we will stand upon the argument addressed to them in the Brief for Petitioner in the District Court (R[a] 151-237a, 300-352a)." [11] (Emphasis added)

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[8] See footnote 7, *infra*.

[9] Argued in part V of petitioner's Argument, (Pet. 35).

[10] Brief of Petitioner-Appellee in the Court of Appeals for the Sixth Circuit, Case No. 16077, page 9.

[11] *Id.* at 10.

Respondent wishes to point out that all of the stipulated issues before, but not considered by, the District Court[12] with the exception of stiplated issues numbered 18, 19, and 21 (Ra. 400a) were before the District Court on a stipulated set of facts contained in Pre-Trial Order No. 4 (Ra. 150a (6). Although petitioner had the opportunity (Ra. 150a (16), he did not subsequently present any evidence to substantiate the latter three issues and should not now be heard to say that he was deprived of a proper review thereon in the court below.

A reading of the two briefs submitted by petitioner to the District Court (Ra. 151a & 300a) shows clearly that petitioner evidently did not consider stipulated issues 18, 19, and 21 important because, although he would stand upon his argument of them in his briefs to the District Court, those briefs contain no argument addressed thereto.

Although petitioner now feels that he was denied due process of law, because he claims the Court of Appeals did not *adequately* consider these issues, he evidently did not think the *total failure* of the District Court *to consider them at all* a sufficient denial of due process of law to even assign such failure to consider them, as error in a cross-appeal. Having failed to do so the petitioner now desires this Court to review on certiorari an *alleged* error in the Court of Appeals which, when committed in a larger magnitude by the District Court deciding in petitioner's favor, was not even pressed by him in the Court of Appeals. Petitioner was of the opinion, that the Court of Appeals could, if it disagreed with the District Court decision, either remand or decide itself the issues not considered by the District Court.[13] Upon a stipulated set of facts the Court of

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[12] Stipulated issues numbered 1, 9, 11, 12, 17, 18, 19, 20, and 21., (Ra. 404a)

[13] Brief of Petitioner-Appellee in the Court of Appeals for the Sixth Circuit, Case No. 16,077, pages 9 & 10.

Appeals considered the stipulated issues not considered by the District Court. The Court of Appeals took this case under consideration after oral argument on the 9th day of October, 1964 and rendered its decision consisting of some 80 pages on the 5th day of May, 1965. In that decision the Court of Appeals stated ". . . we consider that the case made in the District Court is before us and we have considered and found without merit the other claims of constitutional vice in the judgment convicting Dr. Sheppard." (Rs. 57) And, as the dissenting judge remarked, "My brothers, . . . have written a careful and scholarly opinion." (Rs. 92)

For the petitioner to say, after seven months consideration of this case by the Court of Appeals, after that Court stated it did consider *all* the issues, after the petitioner himself did not press consideration of all the issues upon that Court, is for him to unnecessarily impugn the sincerity and conscientiousness of the Court of Appeals. The Court of Appeals *did* consider *all* the issues. But after asserting that they did not do so adequately, petitioner cites not that first instance which even hints at substantiating his claim or in what particulars the Court of Appeals denied him a full and fair review, except for the fact that they did not write at length in their opinion concerning the issues not considered by the District Court.

Respondent is sure that the Court will agree when he says that petitioner's third "reason" (Pet. 14) relating to this Question Presented amounts to no reason at all and that petitioner has failed to present anything in the nature of "special and important reasons" for which the Court will grant certiorari, let alone an error of such magnitude as to constitute a denial of due process.

(3) "10. *Did the court below improperly foreclose without litigation the question of the sufficiency of the evidence?*" [14]

As noted before, petitioner's second "reason" (Pet. 14) relates to this question as a reason why the Court should grant certiorari to review it.[15] The District Court refused to consider (Ra. 403a) stipulated issue number 19 (Ra. 400a) which questioned whether or not the Supreme Court of Ohio correctly determined upon appeal that the evidence introduced at trial was sufficient to sustain a conviction. Although the District Court did not consider the issue, neither did it or the Court of Appeals "foreclose without litigation the question of the sufficiency of the evidence." As noted in respondent's previous argument II. A. (2), *petitioner* did not argue this issue in his brief (Ra. 151a & 300a) filed in the District Court. He further waived oral argument in that court. (Ra. 295a) It was an "additional issue" [16] which was "brought to this Court's [Court of Appeals] attention" [17] but not argued. As he did in relation to his Questions Presented number 9. (Pet. 3), discussed above, petitioner attempts to assign error to the proceedings of the Court of Appeals for a situation for which petitioner himself is responsible. Further, and more important, it simply is not true that the court below foreclosed litigation of the sufficiency of the evidence. But on the contrary considered, decided, and discussed the issue in its opinion. (Rs. 57-58) Petitioner "simply [did not] press it at [that] time." (Rs. 58)

Respondent emphasizes that petitioner's argument of this Question Presented *does not contend* that the Court of Ap-

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[14] Argued in part VI of petitioner's Argument, (Pet. 35).

[15] See footnote 7 *infra*.

[16] Brief of Petitioner-Appellee in the Court of Appeals for the Sixth Circuit, Case No. 16,077, page 10.

[17] *Ibid.*

peals' decision that ". . . Dr. Sheppard's conviction is not 'so totally devoid of evidentiary support' as to constitute a denial of due process," (Rs. 58) was incorrect [18] or that it presented a conflict with decisions of other courts of appeal on the same matter or that it is incompatible with the applicable decisions of this Court or that any other "special and important reason" is thereby presented which would call for the Court to grant certiorari. He does not even now ask the Court to review the trial transcript to determine for itself that the evidence was constitutionally insufficient to convict petitioner. (Pet. 41) What petitioner does desire, however, is that not he, but the federal courts "litigate" the question of sufficiency of evidence, and, because they did not "litigate" it, claims that therein lies "special and important reasons" why this Court should grant certiorari. Petitioner fails to realize that it is not the duty of the federal courts to litigate the issue but to consider and decide the question presented upon the evidence and argument offered. In *Rice v. Sioux City Cemetery,* 349 U.S. 70, 99 L. Ed. 897, 75 S. Ct. 614 (1954), Mr. Justice Frankfurter, speaking for the Court, made clear at page 74 that ". . . this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. *Magnum Import Co. v. Coty,* 262 U.S. 159, 163; . . . ." and at page 79 of the same case ". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties. . . ."

This Question Presented by the petitioner is but another example of his continuing effort to get some court, some-

[18] Court of Appeals cited in support hereof the following cases: "*Garner v. Louisiana,* 368 U.S. 157, 163 (1961); *Thompson v. City of Louisville,* 362 U.S. 199 (1960); and *Hall v. Crouse,* 339 F. (2) 316, (CA 10, 1964)."

where, to say that he is not guilty of the crime with which he was charged. He "... contends that someone, somewhere, ought to be required to show proof of his crime which satisfied minimum requirements of due process." (Pet. 42) Petitioner has neither presented nor does there exist any error below with respect to the review of this issue and petitioner has neither presented nor do there exist any "special and important reasons" for granting the writ to review this question.

(4) "11. *Did the court below erroneously rule that no combination of individual errors, none of which rises to the stature of a federal constitutional violation, can in the aggregate show that the state court trial fell short of the requirements of due process of law?*" [19]

Not only did the court below not *erroneously* rule as stated by petitioner but it did not even *make* such a ruling. Petitioner mistakes the holding of the Court of Appeals. The District Court, although holding that each of the claimed constitutional violations, i.e. prejudicial pre-trial and trial publicity, alleged bias of the trial judge, alleged prejudicial communications with jurors during deliberation, and improper admission of evidence of petitioner's refusal to take a lie detector test, denied petitioner his right to a fair trial under the due process requirement of the Fourteenth Amendment to the Constitution of the United States, stated that when all five of these violations were cumulated, the trial became a "mockery of justice." (Ra. 475a)

In reviewing the latter proposition of the District Court, the Court of Appeals held:

"We have rejected the claims based on publicity, alleged bias of the trial judge, and communications

[19] Argued in part VII, petitioner's Argument, (Pet 42).

with the jurors because *no showing* has been made that anything improper *in fact* occurred; we are no more willing to *presume* infirmity when these claims and the matter of the lie detector evidence are listed together than when they are considered separately." (Rs. 56, Emphasis Added)

The Court of Appeals did *not* hold that had petitioner's claims been substantiated by facts, they *could not* have found in the cumulative effect a denial of petitioner's constitutional right to a fair trial. They simply held that petitioner failed to present to the court such special facts as to cause the Court of Appeals to *presume* prejudice of constitutional dimension without a *showing* of *identifiable prejudice*. That this is the correct interpretation of the holding of the Court of Appeals is further substantiated by the statement that court made in concluding its opinion, as follows:

"The *facts* of this case do not add up to any of the situations in which the Supreme Court of the United States or any United States Court of Appeals has found it appropriate to strike down a judgment affirmed by the highest court of a state." (Rs. 59, Emphasis Added)

A detailed discussion of just what the Court of Appeals held in reversing the District Court and a clear showing that their holding is in strict conformity with applicable decisions of this Court is contained in Respondent's Argument, II. B. and will not be discussed at length here. Respondent agrees with petitioner when the latter states: "Nor can it be [redacted]hat the combination of intrusions upon *a* defendant's rights *can never* be more grave than any of the parts." (Pet. 42) However, the Court of Appeals in this case has not so held. Had the court found constitutional infirmity in petitioner's trial due to the cumulative effect of the facts of the case, it would have been inconsistent with

their holding upon the major points of the District Court's decision. Had the Court of Appeals done so, they would, in effect, have said that although there is no evidence to show identifiable prejudice denying the petitioner his right to a fair trial, we will presume, because petitioner has so claimed, that the cumulation of his *claims* are such as to have denied him a fair trial.

Consequently, the third "special and important reason" given by petitioner for granting certiorari (Pet. 14) is totally unfounded in relation to petitioner's Question Presented here discussed. Petitioner has again failed to set forth any such reason for the granting of a writ of certiorari.

B. THERE DO NOT *EXIST* ANY "SPECIAL AND IMPORTANT REASONS" WHY THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO REVIEW PETITIONER'S QUESTIONS PRESENTED.

Respondent has shown in the foregoing part II.A. of his Argument that petitioner has failed to *present* any "special and important reasons" of the character which will move the Court to grant certiorari to review the decision of a lower court. Respondent will further show in the following part of his Argument that no such reasons actually *exist*. This portion of the Argument will review as briefly as possible the decision of the Court of Appeals and the law applicable to the questions presented it, in order to show that its reviewing process and its decision did not fall short of that required by current habeas corpus and other decisions. Petitioner's Questions Presented numbers nine, ten, and eleven have been fully discussed previously and will not again be covered, except insofar as it is necessary to review the merits of the claims of constitutional violations to which they refer and to make clear what petitioner has made confusing.

(1) *The decision of the Court of Appeals held and held only that with respect to all of the issues discussed in its opinion, except the issue of the lie detector evidence, the facts of this case did not justify the District Court in presuming violations of petitioner's constitutional rights to a fair trial without a showing of identifiable prejudice and that with respect to the issue of the lie detector evidence, its admission was of the character of a non-constitutional error, cognizable as error only on appeal.*

Respondent submits that petitioner has failed to comprehend, for the most part, the true holding of the Court of Appeals. The following quotations are statements of the Court of Appeals taken from its opinion and are presented in the order in which they appear in the opinion. Further, all italicized portions are by the respondent.

"Before examining in detail the nature of the publicity given Dr. Sheppard's case, it is well to note that *he must carry the burden of demonstrating* the constitutional vice in his conviction." (Rs. 8)

"In determining whether Dr. Sheppard *has carried the burden of demonstrating* the unconstitutionality of his trial, surrounded as it was by pervasive publicity, it is our duty to review independently this voir dire examination. . . ." (Rs. 11)

"Our negative holding that Dr. *Sheppard has not demonstrated an adequate basis* in the pre-trial publicity for disregarding the juror's assertions of impartiality would be sufficient to dispose of this aspect of his petition." (Rs. 24)

". . . but with the single exception of the Winchell broadcast noted below *there is no specific showing* that any of the jurors had any *contact* with the trial publicity." (Rs. 26)

"In view of the presumption that such instructions were obeyed, we must hold that *petitioner has failed to*

carry the burden of demonstrating a denial of due process in the trial publicity." (Rs. 30)

"*We hold* that petitioner failed to meet his burden of proving that the pretrail and trial publicity discussed above denied him due process of law or its equal protection." (Rs. 34)

"Accepting his [District Judge] finding that Judge Blythin [trial judge] in fact made the statements attributed to him, *we are not persuaded that petitioner has met his burden of proving* deprivation of his constitutional rights in this regard. *Absent some proof that an early impression of petitioner's guilt so infected Judge Blythin's judicial disposition as to impair his ability to provide petitioner a fair trial, we cannot join in the holding of the District Court.*" (Rs. 39)

"The showing that communications were had with the jurors, accordingly, is not of itself enough to demonstrate a denial of due process. . . . Here there is no pretense at showing that prejudicial statements were made to the jurors. . . . In view of *the absence of any attempt to demonstrate or even claim* such violations here, we are satisfied that the Ohio Supreme Court correctly disposed of this issue. . . . *Dispensing* with the requirement that improper communications be shown in such a situation *cannot be related to the present situation,* where we are shown only that some members of the jury made brief telephone calls to members of their families. . . ." (Rs. 44 & 45)

Respondent has alluded to other statements in the opinion of the court below which indicate what the majority considered the basis of its opinion.[20] And lastly, in denying the petition for rehearing the majority again reiterated the basis of their decision saying:

"This Court's majority holding was bottomed upon the conclusion that the petitioner had failed to meet his burden of proving 'not as a matter of speculation but

[20] See part II.B. (4) of respondent's Argument.

as a demonstrable reality' that upon his trial he was deprived of federally granted constitutional rights." (Rs. 112)

It is obvious from the foregoing quotations, the Court of Appeals applied, and rightly so, the rule announced by this Court in *Stroble v. California, supra.* The question before the Court in *Stroble* was whether or not the newspaper publicity aroused such prejudice in the community that the defendant's trial was " 'fatally infected' with an absence of 'that fundamental fairness essential to the very concept of justice.' *Lisenba v. California,* 314 U.S. 219, 236, 86 L.Ed. 166, 180, 62 S. Ct. 280 (1941)" *Stroble v. California, supra,* 191-192. The Court agreed with the California Supreme Court in finding that defendant had failed to show the newspaper publicity had so infected his trial by arousing prejudice against him in the community that he was denied a constitutionally fair trial. The rule announced was as follows:

> "He asks this Court simply to read those stories and then declare, over the contrary finding of two state courts, that they necessarily deprived him of due process. That we cannot do, at least where, as here, . . . *there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury." Stroble v. California, supra,* 195.

Then the Court in *Stroble* set forth thereafter the following quotations from *Adams v. United States ex rel. McCann,* 317 U.S. 269, 87 L.Ed. 268, 63 S.Ct. 236 (1942)

> "If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality." *Adams v. United States ex rel. McCann, supra,* 281.

The last quotation is the esesnce of the rule of law upon which the Court of Appeals has based its decision and the reason for which it reversed the decision of the District Court.[21] Before looking at why the Court of Appeals applied this general rule of law, it is necessary to contrast the basis of its decision with the reasons upon which the District Court bottomed its decision.

(2) *The District Court held that in its view, the facts presented such untoward circumstances surrounding petitioner's trial as to be inherently bad, and prejudice to the petitioner could thereby be presumed without requiring a showing of identifiable prejudice.*

Feeling that the "circumstances are unusually compelling" (Ra. 439a) the District Court asserted that the present case was "analagous to *Rideau*" (Ra. 443a).[22] And the District Court held:

> "... the prejudicial effect of the newspaper publicity was so manifest that no jury could have been seated at that particular time in Cleveland which would have been fair and impartial regardless of their assurances or the admonitions and instructions of the trial judge." (Ra. 444a, Emphasis Added)

and,

> "This court holds that there was such a plethora of prejudicial material contained in the newspapers that no admonition or charge of the court could vitiate the effect of the publicity." (Ra. 450a)

and, speaking of the alleged bias of the trial judge,

> "... this Court can come to no conclusion but that the presumption of the trial judge's impartiality was

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[21] This is not applicable to the Court of Appeals' decision relative to the lie detector issue which will be discussed below at II.B.(3).

[22] *Rideau v. Louisiana*, 373 U.S. 723, 10 L.Ed. 2d 663, 83 S. Ct. 1417 (1963).

> removed and in its place there arose a *presumption* that he was prejudiced against petitioner." (Ra. 460a, Emphasis Added)

And regarding the telephone calls made by jurors,

> "There is nothing in the record *to show the harmlessness* of that part of the telephone conversations which the bailiffs could not hear." (Ra. 474a, Emphasis Added)

In reviewing the decision of the District Court against the background of the record before both the District Court and the Court of Appeals, the latter characterized the former's decision as follows:

> "Before detailed discussion of the issues before us, it should be preliminarily observed that *Dr. Sheppard was released not because of any evidentiary showing* that the jury was prejudiced by the newspaper and other publicity *or that the trial judge exhibited* partiality or prejudice in his conduct of the trial, nor because any evidence that the jurors calls to their homes contained any improprieties. *The District Judge presumed* that the judge and jury *must have been* so affected by the publicity and other events as to be unable to discharge their respective responsibilities in keeping with constitutional standards." (Ra. 3, Emphasis Added)

It is evident from the foregoing that the District Court bottomed its decision upon an exception to the general rule applied by the Court of Appeals. This exception was announced and applied in *In Re Murchison, supra.* The proposition employed is to the effect that when there exists such untoward circumstances surrounding a trial involving such a probability that prejudice will result, the trial may be deemed inherently lacking in due process without a showing of identifiable prejudice to the accused.

(3) *What considerations govern the determination to apply the general rule or the exception to the general rule discussed in II.B. (1) and II.B. (2) above respectively?*

The same evidence and stipulated facts were before both courts below, yet each applied different rules. The question thus presented is; When is a court justified in applying the exception to the rule as did the District Court, and when is a court obliged to apply the general rule exemplified in the decision below? The most recent case of *Estes v. Texas, supra,* placed squarely before the Court the necessity to determine the answer to this qustion. Although the *Estes* case is inapposite to the present upon its facts, it does bring into focus the considerations upon which the determination to apply the rule or the exception to the rule must rest. The following is in *pertinent part,* the Court's discussion thereon.

> ". . . It is true that *in most cases* involving claims of due process deprivations *we require a showing of identifiable prejudice* to the accused. Nevertheless, *at times a procedure employed by the State involves such a probability that prejudice will result* that it is *deemed inherently lacking in due process.* Such a case was *In Re Murchison,* . . . . (Emphasis Added)
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> * * * * * * * * *
>
> "This rule was followed in *Rideau* [*v. Louisiana*] *supra,* and in *Turner v. Louisiana,* 379 U.S. 466 (1965). In each of these cases the Court departed from the approach it charted in *Stroble v. California,* [*supra*], . . . and in *Irvin v. Dowd,* 366 U.S. 717 (1961), where we made a careful examination of the facts in order to determine whether prejudice resulted. In *Rideau* and *Turner* the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it. Likewise in *Gideon v. Wainwright,* 372 U. S. 335 (1963) and

White v. Maryland, 373 U.S. 59 (1963) we applied the same rule, although in different contexts.

* * * * * * * * *

"In *Turner* . . . [n] o prejudice was shown but the *circumstances were* held to be *inherently suspect*, and therefore such a showing was not held to be a requisite to reversal. . . . This was found true in *In Re Murchison, Tumey, Rideau*, and *Turner*. Such *untoward circumstances* as were found in those cases are inherently bad and prejudice to the accused was presumed." (Emphasis Added) *Estes v. Texas, supra*, 33 U.S. L. Week 4546 (June 7, 1965)

Resolution of the issue of whether or not the accused was denied his constitutional right to a fair trial must, of necessity, turn on the special facts of each case. That proposition is implicit in the preceding discussion of the rule and its exception taken from the *Estes* case, *supra*. Recognizing the existence of the general rule applied in most cases, the Court points out that when the special facts of the case present "such untoward circumstances", application of the exception to the rule is justified. "Such untoward circumstances" as were found in the facts of *In Re Murchison, Tumey, Rideau, Turner, White*, and *Gideon*[23] were deemed by this Court to be inherently suspect and infused with such a probability of prejudice, that the accused was relieved of the burden of showing instances of identifiable prejudice. Thus has the Court furnished standards of measurement by which all courts may determine when a case presents circumstances justifying the use of the exception to the general rule. After such a determination, a presumption of prejudice may be indulged without requiring an

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[23] *In Re Murchison, supra*; *Tumey v. Ohio*, 273 U.S. 510, 71 L.Ed. 749 (1927); *Rideau v. Louisiana, supra*; *Turner v. Louisiana, supra*; *White v. Maryland, supra*, and *Gideon v. Wainwright, supra*, respectively.

evidentiary showing thereof as required by the general rule.

(4) *The Court of Appeals correctly considered all of the evidence before both courts below and correctly determined therefrom that the circumstances surrounding petitioner's trial were not so untoward as to be inherently suspect and liable to a presumption of prejudice.*

The District Court evidently viewed its findings of fact as presenting "such untoward circumstances" in comparison with *Rideau, supra,* and for that reason presumed that petitioner's trial was unconstitutionally invaded by prejudice denying him of his federally granted right to a fair trial. The Court of Appeals held that should the District Court's ultimate conclusions be viewed as findings of fact, they were clearly erroneous.[24]

Pretrial publicity: The Court of Appeals began its opinion with a reference to the general rule requiring that petitioner show as a demonstrable reality the identifiable prejudice he alleged constituted the denial of his constitutional rights.[25] The court below then set out to examine the voir dire record[26] as this Court did in *Irvin v. Dowd, supra,* 723. They found *no* evidence of prejudice.[27] Following this the court reviewed the pretrial publicity[28] pointing out specific instances which show that the publicity was by no means entirely lopsided against petitioner or was of a nature comparable with that in *Rideau,* and *Irvin, supra.*[29] The District Court relied heavily on the *Rideau* and *Irvin*

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[24] Rs. 113
[25] Rs. 8
[26] Rs. 11-12
[27] Rs. 12
[28] Rs. 13-16
[29] Rs. 13-23

cases as support for its position. The Court of Appeals went to some length to show the facts of the Sheppard trial in no way paralleled or in any way measured up to the special facts of those two cases,[30] or any other case cited by the District Court.[31] It concluded that facts in the Sheppard trial did not present "such untoward circumstances" as to take it out from under the application of the general rule and place it within the scope of the exception.[32] However, the court below was not satisfied with merely a negative holding against the decision of the District Court, although such was a sufficiently adequate basis for reversal.[33] Instead, the Court of Appeals went further to show "the affirmative reasons for refusing to ignore those assertions." (petitioner's assertions of constitutional vice in his trial)[34] *It should be noted here that the dissenting judge below concurred in the holding of the majority on the issue of pretrial publicity.*[35] He said:

> "I also agree with my brothers that the clamorous and frequently abusive publicity prior to trial, plus the trial judge's denial of change of venue, probably did not, of themselves, rise to the level of constitutional violations."[36]

Trial publicity: The Sixth Circuit then turned to a review of the District Court's decision on the question of prejudicial trial publicity[37] pointing out that no contention was made that the newspaper accounts of the trial were

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[30] Rs. 16-23
[31] Rs. 21-23
[32] *"Beck v. Washington*, 369 U.S. 541, 557, 8 L.Ed. 2d 98, 82 S. Ct. 955 1962)" (Rs. 23)
[33] Rs. 24
[34] Rs. 24-25
[35] Rs. 92
[36] *Ibid.*
[37] Rs. 25

substantially inaccurate.[38] The Court of Appeals found the following facts: (1) that there was not the first indication of jurors having contact with the trial publicity contained in the evidence before the courts below,[39] (2) that the trial judge thoroughly and continuously from the beginning to the end of the trial reminded the jurors of their duty and responsibility to remain fair and impartial, to disregard everything that did not transpire in court, and to avoid contact with publicity concerning the trial,[40] (3) that trial counsel for petitioner never expressed dissatisfaction with such instructions,[41] (4) that the law presumes "the jury to have obeyed their instructions to avoid all contact with publicity concerning the case before them until *some* contrary showing has been made.",[42] (5) that no such showing was made,[43] (6) that jurors were interrogated with respect to two radio broadcasts, all denied any prejudice therefrom against petitioner, and were duly instructed to forget the broadcast,[44] and (7) that trial counsel for petitioner had an opportunity to interrogate the jurors on their motion for a new trial because of trial publicity and failed to do so.[45] The court finally concluded that the most they could do would be to guess whether or not the jurors violated their oaths and that such was not sufficient to rebut the presumption of their fidelity to the duties and responsibilities imposed upon them by that oath.[46] Further, the Court of Appeals could not find the trial judge to be prejudiced due

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[38] *Ibid.*
[39] Rs. 26
[40] Rs. 26-27
[41] Rs. 28
[42] Rs. 29
[43] Rs. 30
[44] Rs. 29-30
[45] Rs. 30
[46] *Ibid.*

to publicity on the "basis of a trial record entirely devoid of any evidence of trial misconduct on his part."[47]

Biased trial judge: The next alleged violation of petitioner's constitutional right to a fair trial considered by the Court of Appeals consisted of an allegation that the trial judge was prejudiced against petitioner. Petitioner based this charge upon two statements. One was an unsworn statement by Dorothy Kilgallen Kollmar and the other was made by an employee in the office of the Clerk of the Court of Common Pleas of Cuyahoga County, Ohio, at the time of the Sheppard Trial.[48] The Court of Appeals found (1) that the District Judge erred in considering both statements to have the strength of "uncontroverted evidence"[49] and (2) that there was sufficient evidence to contradict these statements.[50] The court cited numerous instances thereof[51] which were a matter of permanent record made at the time of Sheppard's trial as opposed to recollections of memory ten years old. Specific discussion was made of the fact that petitioner's trial counsel himself felt sure that the trial judge was completely impartial.[52] The court concluded (without holding as clearly erroneous the District Judge's finding of fact)[53] that "petitioner failed to sustain his burden of proving deprivation of his constitutional rights in this regard."[54] in view of the presumption of regularity in the trial judge's conduct of the trial. *The dissenting judge in the Court of Appeals concurred in the result reached by the majority on this issue.*[55] The court then, as

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[47] Rs. 32
[48] Rs. 35
[49] Rs. 35-36
[50] Rs. 36
[51] Rs. 36-38
[52] Rs. 38
[53] Rs. 39
[54] *Ibid.*
[55] Rs. 92

it did in regard to the issue of pretrial publicity, went further to review the law on this subject to show that the most important cases dealing with an unconstitutionally biased judge presiding at an accused's trial were completely inapposite to the Sheppard trial.[56]

The issue of the lie detector evidence: Petitioner's complaint of constitutional vice in his trial with respect to lie detector evidence relates to the fact that the press made frequent reference to petitioner's refusal to take a lie detector test including the reasons given by him for refusing and the fact that police officers testified at trial to his refusal to submit to a lie detector test.[57] Although petitioner's trial counsel objected to introduction of testimony relating that Bay Village, Ohio Mayor Houk took a lie detector test, petitioner's trial counsel failed to object to the introduction of testimony that petitioner had refused to do so.[58] On the contrary, such refusal was freely discussed on direct, cross, redirect, and recross examination without objection, testified to by petitioner himself, and alluded to by both prosecution and defense counsel in closing argument.[59] Defense counsel requested an instruction to the jury that petitioner was not required to take a lie detector test and that the results of such tests were inadmissible in court.[60] The trial judge instructed the jury[61] that petitioner was not required to take a lie detector test. The Court of Appeals duly noted that neither the District Judge nor petitioner have alluded to any decisions ruling unconstitutional the admission of testimony, freely corroborated by the accused himself, that a defendant has refused to take a lie detector test. Following

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[56] Rs. 43
[57] *Ibid.*
[58] *Ibid.*
[59] Rs. 45-46
[60] *Ibid.*
[61] Rs. 45

this the opinion of the court below cites cases it deems appropriate.[62] Without determining the specific constitutional question posed by petitioner,[63] the Court of Appeals held that admission of the evidence in question did not constitute error of a constitutional dimension in petitioner's trial.[64] "If there was fault in what occurred, it was non-constitutional error which should have been assigned on appeal. Habeas corpus is not to be employed as a substitute for appeal."[65] The court bottomed its holding on this question on the facts that defense counsel deliberately withheld objections to the introduction of this evidence, that no motion to strike the pre-objection evidence was made, that no written instructions thereon were ever proffered, and that no error was ever assigned on appeal.[66]

The issue relating to telephone calls made by jurors to members of their family during the jury's deliberations: The stipulated facts of this issue are set forth in the opinion of the court below[67] as well as testimony[68] taken of the bailiff in charge of the jury members when sequestered for deliberation. The Supreme Court of Ohio failed to find reversible error.[69] The Court of Appeals felt that the District Judge "place[d] reliance on cases the facts of which disclose their lack of resemblance to the case before him and us."[70] and then proceeded to discuss the cases involved at some length[71] including the very recent case of *Turner* v. *Louisiana*, *supra*. Further, the Court of Appeals pointed

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[62] Rs. 48
[63] *Ibid.*
[64] *Ibid.*
[65] *Ibid.*
[66] Rs. 47
[67] Rs. 50
[68] Rs. 51
[69] *Ibid.*
[70] Rs. 52
[71] Rs. 53-56

out that *there was no evidence* of any impropriety in the communications and held that in view of this fact and the presumption "that the jurors remained true to their instructions"[72] the situation could not be related to that set of facts found in *Turner* v. *Louisiana, supra,* so that the deprivation of constitutionally granted and protected rights could be presumed.

Argument of the remaining issues i.e. review of other claimed constitutional violations, sufficiency of the evidence, and the cumulative effect of the alleged constitutional violations has been thoroughly presented in parts II.A. (2), II.A. (3), and II.A. (4), respectively, and respondent will not belabor them here. Respondent realizes that he has presented a rather extended outline of the opinion of the Court of Appeals and that such is somewhat atypical of an argument. However, the only reason of any significance relied on by petitioner, slight as it may be, for justifying his petition to the Court to grant certiorari, is that the reviewing process of the Court of Appeals fell short of that required by current habeas corpus decisions. The foregoing part of II.B. (4) is a forthrightly stated condensation (albeit lengthy) of the opinion of the Court of Appeals, presented without embellishment or misleading statements. Merely standing by itself the above outline clearly shows that the review afforded this case by the Court of Appeals was nothing less than an inspiring example of the seriousness, conscientiousness, and professional thoroughness which makes our system of jurisprudence indispensible to the continued existence of a nation of free men. But of more immediate importance is that the foregoing clearly undermines petitioner's unfounded and unsupported allegation that the Court of Appeals failed to decide this case

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[72] Rs. 55

properly. On the contrary, it shows that the Court of Appeals had a firm grasp, not only of the facts in petitioner's favor but of *all* the facts, that it compared these facts to the special facts of pertinent cases decided by this Court and other courts of appeal, that it *demonstrated* that the facts present in this case did not amount to "such untoward circumstances" as to justify a presumption of prejudice to the petitioner during his trial, and then that it proceeded to apply the law to the facts of the case in strict conformity with the applicable decisions of this Court.

CONCLUSION

The crucial difference between the decision of the District Court and that of the Court of Appeals is in each court's appraisal of the facts. Respondent contends that the Court of Appeals presents the far more correct view of the facts of the Sheppard trial than did the District Court. The latter's view of the facts is clearly erroneous. Nevertheless, even if one could not say that the District Court was clearly erroneous in its finding of facts or assessment of the circumstances surrounding the Sheppard trial, there would still be no "special and important reasons" for the Court to grant certiorari. In *Rogers v. Missouri Pacific R. R. Co.*, 352 U.S. 521, 1 L. Ed. 2d 515, 77 S. Ct. 461 (1957) the dissenting[73] Justice stated at page 351-352:

> "The course of argument and the briefs on the merits may disclose that a case appearing on the surface to warrant a writ of certiorari does not warrant it . . . or may reveal more clearly that the only thing in controversy is an appraisal of facts on which this Court is being asked to make a second guess, to substitute its assessment of the testimony for that of the court below."

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[73] The controversy in the differing opinions in this case did not go to the matter quoted.

At page 356 of the same case the same Justice makes clear that the Court does not accept cases on certiorari to review evidence. It is for this reason among others that Respondent maintains that certiorari should not be granted. This brief attempts to make clear that, although this case may appear on the surface to warrant a writ of certiorari, the only thing in controversy is an appraisal of the facts. The Court should not be asked to second guess and does not sit to substitute its assessment of the testimony for that of the Court of Appeals.

Petitioner has failed in all respects to present "special and important reasons" why this Court should grant a writ of certiorari to the United States Court of Appeals to review their decision in this case. He nowhere cites a decision of another court of appeals on the same matter with which the decision of the Sixth Circuit is in conflict. As noted previously, "The facts of this case do not add up to any of the situations in which the Supreme Court of the United States or any United States Court of Appeals has found it appropriate to strike down a judgment affirmed by the highest court of a state."[74] The Court of Appeals has not decided an important state or territorial question let alone in a way in conflict with applicable state or territorial law. It has decided a question of federal law which is always important both to the individual and the state, but petitioner has not indicated any question of federal law presented in this case which has not been decided by this Court. There simply is no important federal question presented here not previously decided by the Court. The decisions of the Court which are pertinent to the questions presented here, some of which are landmarks of the law

[74] Rs. 59

and some new, provide unequivocal direction for the manner in which this case should and was in fact decided.

Merely a superficial reading of the Court of Appeals' opinion will make patently clear that it did anything but depart from the accepted and usual course of judicial proceedings and it certainly did not sanction such a departure by a lower court.

Respondent is moved to urge once more that Samuel H. Sheppard's petition for writ of certiorari should be denied as improvident. A statement made by the Court of Appeals in concluding its discussion of the issue relating to the lie detector evidence is most appropriate at this point with respect to, not only that one issue, but to the original trial and all of the numerous judicial proceedings in the ten years since his conviction which have been concerned with affording petitioner a full and fair review of his trial and the adjudication of his constitutional rights.

> "As proud as we are of the great traditions of our courts and their concern for the rights of those accused of crime, we are aware that like all human institutions they seldom act with perfection. It is not difficult, after ten years of searching analysis and contemplative study and the announcement of some new judicial attitudes, to find some imperfections in the conduct of a trial and to conclude that a judge or any attorney could have done a better job. But stability of the law and a nation's respect for its courts will disappear if, long after the event, their judgment may be set aside because a trial judge's discretion was less than perfectly exercised or because it is thought that the trial plan of the defense counsel was not the best that could have been employed. This must be especially true where an accused has enjoyed adequate and full opportunity for appellate review." [75]

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[75] Rs. 49

The petition for writ of certiorari to the United Siates Court of Appeals for the Sixth Circuit should be denied and the Court is hereby respectfully urged to deny said petition.

Respectfully submitted,

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JOHN F. DAVIS, C

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 490.

SAMUEL H. SHEPPARD,
Petitioner,

v.

E. L. MAXWELL, Warden,
Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF RESPONDENT.

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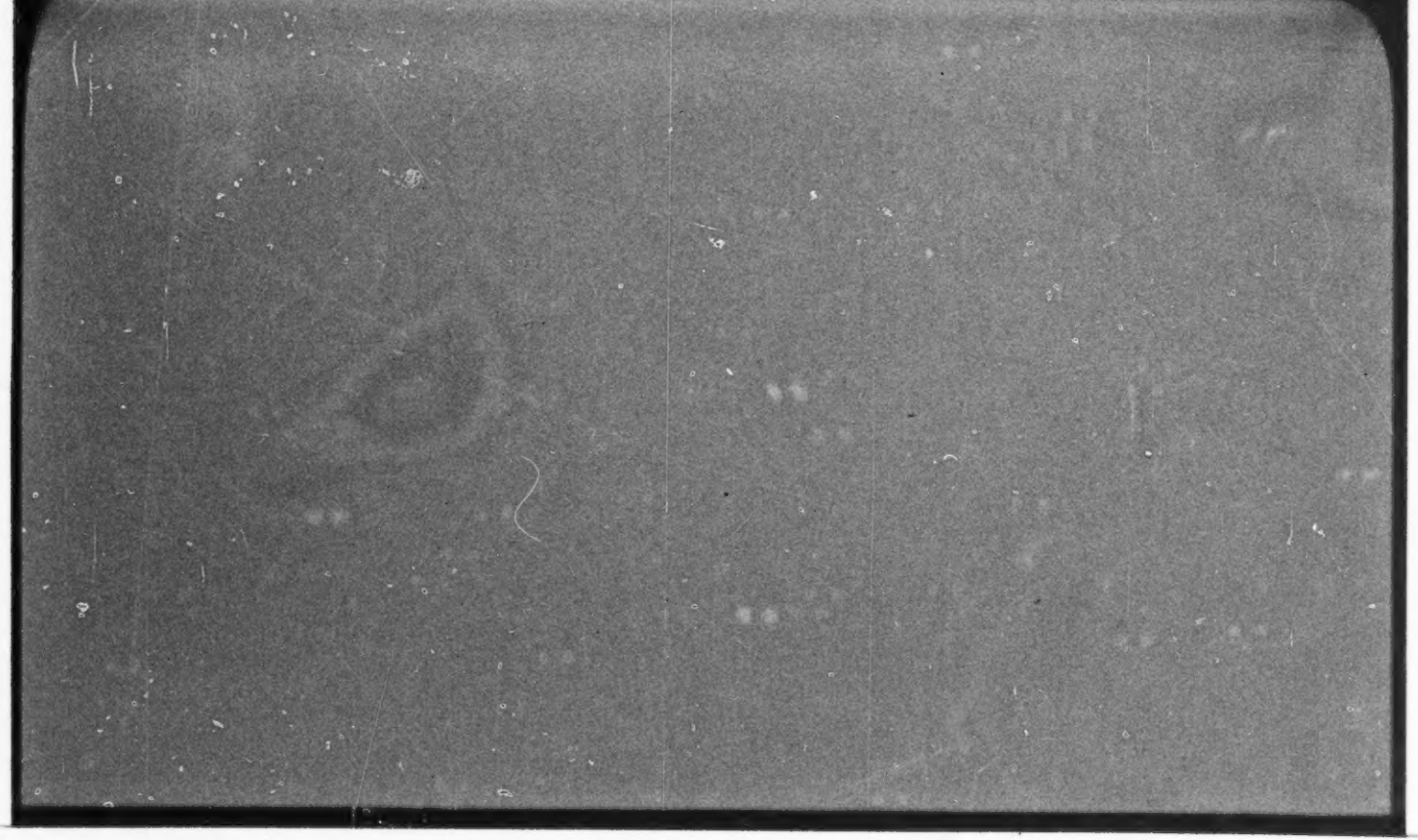

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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 490.

SAMUEL H. SHEPPARD,

Petitioner,

v.

E. L. MAXWELL, Warden,

Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF RESPONDENT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

In accordance with Rule 27 of this Court that consent to the filing of a brief of an amicus curiae need not be had when the brief is presented for a political subdivision of a State sponsored by the authorized law officer thereof, the Prosecuting Attorney of Cuyahoga County, Ohio respectfully requests consideration of the Brief of the Prosecuting Attorney in the disposition of the pending petition for a writ of certiorari in the above entitled case.

OBJECTIONS TO JURISDICTION.

This State criminal case was tried in 1954 in Cuyahoga County, Ohio. The judgment of conviction, the judgment of the trial court overruling the motion for a new trial, and the judgments of the state appellate courts, have already been considered by this Court for review on a writ

of certiorari, and certiorari was denied. *State v. Sheppard*, 352 U. S. 910, 1 L. Ed. 2d 119, 77 Supreme Court 118 (1956). Petition for rehearing was denied on December 17, 1956, *State v. Sheppard*, 77 Supreme Court 323, 352 U. S. 955, 1 L. Ed. 2d 245.

All of the alleged errors and issues that were raised in the State Courts, including pre-trial publicity, publicity during trial, whether a change of venue and/or a continuance should have been granted, whether the trial judge deprived petitioner of a fair trial in the handling of the judicial proceedings, and whether a fair and impartial jury was impaneled and maintained on the trial of this case, were before this Court for review in 1956. And the same editorials, newspaper articles, national comment on the trial, photographs at the inquest and trial, the demand for petitioner's home, affidavit in support of motion for new trial, transcript of the bail hearing, that are incorporated in the Appendix to the present petition are to be found in the Appendix to the former petition that was before this Court for consideration and review. The several newspaper articles added to the present petition, together with the chapter from a book commenting on the case, as well as the claims made in the petition concerning publicity, represent a piecemeal presentation to this Court of more of the same thing that the court was called upon to consider nine years ago, namely, publicity. As the United States Court of Appeals stated in the majority opinion, "The main issues in this case are not the belated discovery of present counsel." (Pet. Rs. 8.)

In the well reasoned opinion and decision of the United States Court of Appeals for the Sixth Circuit, reversing the judgment of the federal district court in the habeas corpus proceeding here involved, Circuit Judge O'Sullivan, speaking for the majority, said:

"Before detailed discussion of the issues before us, it should be preliminarily observed that Dr. Sheppard was released not because of any evidentiary showing that the jury was prejudiced by the newspaper and other publicity or that the trial judge exhibited partiality or prejudice in his conduct of the trial, nor because of any evidence that the jurors' calls to their homes contained any improprieties. The District Judge presumed that the judge and the jury must have been so affected by the publicity and other events as to be unable to discharge their respective responsibilities in keeping with constitutional standards. Reviewing substantially the same record as did the District Judge here, the appellate machinery of Ohio, challenged to do so, was unable to discern the evils now presumed by the District Judge. Aware that as a matter of formal rule, denial of certiorari by the United States Supreme Court does not bespeak its approval of a state court decision, we do mention that critical points now made by Dr. Sheppard did not excite the Supreme Court to take for review this case now characterized by the District Judge as 'a mockery of justice.' " (Pet. App. A, s.3-s.4.)

The Court of Appeals said further:

"The facts of this case do not add up to any of the situations in which the Supreme Court of the United States or any United States Court of Appeals has found it appropriate to strike down a judgment affirmed by the highest court of a state." (Pet. App. 3, s.59.)

And when the judgments of the state courts were before this Court in 1956 for review on a writ of certiorari, the state courts had not decided a federal question of substance not theretofore determined by this Court, nor had the state courts decided any question in a way not in accord with the applicable decisions of this Court. There is no substantial federal question in this case.

As the Court of Appeals said, there was no evidentiary showing nor any proof offered in the District Court that the jury was prejudiced by the newspaper and other publicity or that the trial judge exhibited prejudice in his conduct of the trial. Nor was any evidence or proof offered in the District Court that the jurors' calls to their homes contained any improprieties. Of a certainty, there is no proof and the petitioner presents in the present petition not a single specific item showing that the jury was influenced on the trial of this case by anything except the evidence presented in open court and the law applicable thereto. Only broad generalities and faulty assumptions are indulged in and argued in the present petition on the aspect of publicity.

Section 2945.83 of the Revised Code of Ohio, governing the state courts on review, provides:

> "No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:
>
> * * *
>
> (C) The admission or rejection of any evidence offered against or for the accused unless it *affirmatively appears on the record* that the accused was or may have been prejudiced thereby;
>
> * * *
>
> (E) Any other cause unless it appears *affirmatively from the record* that the accused was prejudiced thereby or was prevented from having a fair trial."

This state statute is in conformity with the ruling of this Court in many cases. The United States Court of Appeals said:

> "Before examining in detail the nature of the publicity given Dr. Sheppard's case, it is well to note that he must carry the burden of demonstrating the con-

stitutional vice in his conviction. As stated by the First Circuit in another publicity case, 'the question whether jurors are impartial in the constitutional sense is one of mixed law and fact as to which the challenger has the burden of persuasion * * *.' *Geagan v. Gavin,* 292 F. (2) 244, 246 (CA 1, 1961), *cert. denied,* 370 U. S. 903 (1962). This burden is one which must be carried ' "not as a matter of *speculation but as a demonstrable reality.*" ' *United States ex rel. Darcy v. Handy,* 351 U. S. 454, 462, 100 L. Ed. 1331, 1338 (1956) (emphasis supplied); *Stroble v. California,* 343 U. S. 181, 198, 96 L. Ed. 872, 885 (1952). See also *Adams v. United States ex rel. McCann,* 317 U. S. 269, 281, 87 L. Ed. 268, 276 (1942)." (Pet. App. A, s.8.)

In *Stroble v. California,* 343 U. S. 181, 194-196 (1952), Mr. Justice Clark delivered the opinion of the court and stated:

"* * * Indeed, at no stage of the proceedings has petitioner offered so much as an affidavit to prove that any juror was in fact prejudiced by the newspaper stories. He asks this Court simply to read those stories and then to declare, over the contrary finding of two state courts, that they necessarily deprived him of due process. That we cannot do, at least where, as here, the inflammatory newspaper accounts appeared approximately six weeks before the beginning of petitioner's trial, and there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury. * * *"

In *Beck vs. Washington,* 369 U. S. 541, 8 L. Ed. (2d) 98, 82 Sup. Ct. 955 (1962), Mr. Justice Clark delivered the opinion of the Court and said, 369 U. S., at page 556:

"As in his grand jury attack, petitioner makes no claim that any particular petit juror was biased. Instead, he states the publicity which prevented the selection of a fair grand jury also precluded a fair petit jury.

> He argues that such a strong case of adverse publicity has been proved that any jury selected in Seattle at the time he was tried must be held to be presumptively biased and that the trial court's adverse rulings on his motions for a change of venue and for continuances was therefore in error. Of course there could be no constitutional infirmity in the trial court's adverse rulings on the motions for a change of venue and for continuances, if petitioner actually received a fair trial."

The Court said further, 369 U. S., at page 558:

> "While this Court stands ready to correct violations of constitutional rights, it also holds that it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality."

The laws of the State of Ohio provide for a motion for new trial and upon the hearing of that motion, the affidavits and testimony of the jurors may be received, *Emmert v. State,* 127 O. S. 235; *State v. Joseph,* 90 O. A. 433. Although several jurors were subpoenaed and were thoroughly interrogated by defense counsel at the hearing on the motion for new trial, not a word of testimony was produced to justify the defense claim that the jurors were influenced by anything other than the evidence produced in open court, in reaching their verdict. The claim that they were influenced by news stories or any other outside influence is not supported by the record.

And the majority opinion of the United States Court of Appeals in the proceeding here involved, states:

> "1) *Publicity.*
>
> "We should at the outset confess a certain temptation to yield to today's accelerating current of ex-

citement and concern about undue press coverage of criminal charges and trials, and to affirm petitioner's release as dramatic vindication of the bar's contention that some of its own members and some of the various media of information have by misuse of their rights prevented our courts from according fair trial to all who are accused of crime. Doubts as to the efficacy and propriety of such action, however, are supplemented by the certain knowledge that it is our duty as federal judges to avoid a state judgment of conviction only where some constitutional infirmity may be found. Careful consideration of this case leads to the conclusion that no such infirmity infects Dr. Sheppard's conviction." (Pet. App. A, s.6-s.7.)

STATEMENT OF THE CASE.

The Prosecuting Attorney of Cuyahoga County had the responsibility and the burden of handling the prosecution of this case on the trial in 1954, on the appeals through the State courts, and on certiorari in this Court in 1956. The State of Ohio, the plaintiff in the original action, through the office of the Prosecuting Attorney of Cuyahoga County was, therefore, a real party in interest. In all fairness then, counsel of record for the prosecution in the State courts should have been given an opportunity to appear, defend and be heard on this collateral attack that was being made on the Cuyahoga County officials.

However, on the day the habeas corpus proceeding was set for hearing and the writer of this brief put in an appearance as counsel of record in the State courts, she was told by the District Judge that he would not permit her in the hearings; that she was not counsel of record in the habeas corpus proceeding, and refused to put on an order making her counsel of record. Instead, and the same day, the District Judge made an order, Pre-trial Order No.

1 (Appendix, Vol. I, 28a), limiting those who could be in attendance. None of the attorneys listed in Pre-trial Order No. 1 had any previous connection with the case, but the District Judge proceeded to meet with them in closed hearings.

Some time later, an order eventually went on in the District Court, applied for by the Attorney General's office, making the writer counsel of record, but the particular District Judge who handled this proceeding had made it clear to the writer by his hostile attitude, that he did not want her around in the hearings. The court never came out in the open with the case to give the prosecution a chance to orally argue the issues that were being raised.

The habeas corpus proceeding resulted in a one-sided proceeding, a presentation of only the defense side of the case. Pre-trial Order No. 2 (Appendix, Vol. I, pp. 31a-33a) contains the so-called "History of the Case" which the District Court incorporated in its decision, and it gives only the defense version of the evidence.

Pre-trial Order No. 3 (Appendix, Vol. I, pp. 150a(1)-150a(2) contains a stipulation of the twenty-two alleged issues that were to be considered by the District Court, which was later amended to include the twenty-third issue to the effect that the trial judge should have disqualified himself.

Subsequently, the District Court made an Order (Appendix, Vol. III, pp. 295a-296a) that stipulations regarding publicity and related issues were to be filed, and that all evidence in the action was to be presented to the District Court by affidavit and/or deposition. The stipulation that was filed covered fragmentary excerpts from the record and material such as a copy of the petition for a writ of certiorari to the United States Supreme Court and the

Appendix thereto (Appendix, Vol. III, pp. 296a-297a); and it was stipulated that such petition could be used as reference material by the parties. This, if anything, shows the one-sided proceeding that was conducted.

As to the Order of the District Court requiring stipulations and the presentation of evidence by affidavit and/or deposition, the record shows that instead of affidavits or depositions, the petitioner furnished the Court with three unsworn statements, one taken in New York from the New York gossip columnist Dorothy Kilgallen Kollmar, who was not cross-examined, and two taken in Cleveland, from Fred Garmone, one of the former counsel for petitioner, and from Edward Murray, an employee in the office of the Clerk of Courts in Cuyahoga County. The District Judge later held these unsworn statements to be uncontroverted evidence.

The Bill of Exceptions covering the trial of this case, consisting of 12 volumes and a Supplement, was placed on file with the District Court, but there is to be found in the Court's decision, no independent evaluation of the voir dire testimony.

What the District Judge did in the handling of this habeas corpus proceeding, was condemned by this Court in *In Re Oliver*, 333 U. S. 257, 92 L. Ed. 682, 68 S. Ct. 499 (1948).

It was held in *Ex parte Rosier*, 133 F. 2d 316 (C. A. D. C., 1942), at page 325:

> "The decision in Walker v. Johnston that the hearing on controverted issues of fact must be either ore tenus or by depositions is responsive to the requirement of the 5th Amendment that no person shall be deprived of life, liberty or property without due process of law. Can it be doubted that 'due process of law signifies a right to be heard on one's defense'? * * *

> The right of hearing under the due process clause includes *the right of each party to a cause* to introduce evidence in support of his claim or defense, to hear the evidence introduced against him, to test the same by cross-examination, the right that nothing shall be treated as evidence which is not introduced as such, and the right to make argument on both law and fact." (Emphasis ours.)

In *Knewel v. Egan*, 268 U. S. 442, 69 L. Ed. 1037 (1925), case below 298 Fed. 784, which was an appeal from an order of the District Court discharging on writ of habeas corpus one convicted of presenting a false insurance claim, this Court held, at page 447:

> "The real parties in interest in prosecuting the appeal are the state and the present sheriff, who is a public officer representing the county and the state. The substitution of the sheriff as appellant should be made, and the *state be allowed to intervene*." (Emphasis ours.)

No oral argument was had in the District Court proceeding. The record shows that petitioner's counsel waived oral argument and the matter was submitted on briefs.

The District Court stated in the Conclusion of its decision that the trial can only be viewed as a mockery of justice, but his findings show that they are not based upon any examination of the trial record. And, it was a denial of procedural due process of law to the county authorities for the court to make a finding that the trial jury was not a fair and impartial jury without making an examination of the voir dire record to determine that issue. The District Court reviewed the State's case in the light, not of the record, but of what the newspapers had to say to the public before and during the trial, and made a finding that the jury in this case was not a fair and impartial jury because of the stories furnished by the newspapers to the public.

STATEMENT OF FACTS.

The "Statement of Facts" in the body of the present petition at pp. 8 to 13, contains alleged facts that are not supported by the record in this case, and other statements pertaining to the proceedings on the trial which are not representative of the true situation that existed on the trial.

The statements that "examination of the first floor of the house disclosed abundant evidence of ransacking (Pet. p. 9); that petitioner's narrative of what happened at the time of the murder "never varied" (Pet. p. 9); that "Dr. Sheppard exhibited a fractured cervical vertebra" (Pet. p. 10); that "much alleged evidence was announced and summarized by the prosecution prior to its offer in court" (Pet. p. 11); that "a good deal of what was described as damning evidence was never produced" (Pet. p. 12); that "newsmen constantly disrupted the proceedings" (Pet. p. 12); and that "petitioner was repeatedly photographed in the courtroom without his consent" (Pet. p. 12), are not supported by the record in this case.

The omission by the petitioner of all of the pertinent evidence presented by the State in the trial of this case, necessitates our directing the attention of this Court to an objective statement of the evidence as set forth in the opinion of the Court of Appeals of Cuyahoga County (App. Vol. I, pp. 64a-80a). The State proved by direct and circumstantial evidence that Marilyn Sheppard was brutally murdered in her bedroom some time between 3 and 4 a.m. on the morning of July 4th, 1954; that at the time she was murdered the only person in that home, except a six year old son, was her husband, the petitioner. It was conclusive from the evidence that there was a simulated burglary and that nobody but the petitioner had the time and exclusive opportunity to fake such a burglary to divert

suspicion from himself. The evidence was so overwhelming that the burglary set-up was a fake that even counsel for the defense was obliged to say to the jury:

> "Well, of course, we don't claim there was a burglary. I mean I don't know why the intruder was there. We claim there was a man there, but whether he was there for a burglary or not, I don't know. We never claimed that he was." (R. 62, Supp.)

The jury was fully justified in concluding that the only one who was in a position to and had the time, and who actually did set up this fake burglary was the petitioner.

That the story told by the petitioner about the bushy-haired "form" in the house, and on another occasion "forms" (he wasn't sure whether there was one or two "forms") was concocted, is shown by the evidence.

The evidence established that Dr. Lester Hoversten visited the petitioner at Bay View Hospital on July 5th, at which time Dr. Steve came into the room, was irritated and stated that he had left strict orders that no one was to see Sam unless he, Dr. Steve, was first notified (R. 3803).

Dr. Hoversten testified relative to that incident as follows:

> "Q. Did Steve leave at any time after he came in?
>
> A. Yes. After speaking sharply to me, he turned on his heel and walked quickly out of the room, and then he came back in just a few minutes.
>
> Q. And when he came back in, did he say anything?
>
> A. Yes. I remember I was sitting on the left hand side of the bed, and Steve sat near the foot of the bed, and he advised Dr. Sam to go over in his mind several times a day—
>
> As I recall, Dr. Steve addressed Dr. Sam, and said in words to this effect, 'You should review in your mind several times a day the sequence of events as

> they happened so that you will have your story straight when questioned,' and then he gave as an example, 'You were upstairs, you went downstairs, and from here to there,' and so forth." (R. 3812-13.)

The fantastic stories told by the petitioner were so unreasonable and absurd as to be, in the opinion of the jury, unworthy of credence.

The Court of Appeals of Cuyahoga County, after giving in its opinion a summary of much of the evidence dealing with many of the physical facts and conditions of the premises as found on July 4th and of the declarations and actions of the parties involved as testified to by the public authorities and other witnesses, together with what the defendant said to others and in his testimony upon trial in relation to the events of the morning, said:

> "The testimony of the defendant, in dealing with the events that took place in his presence or the things that he did, was characterized by the State as vague, indefinite, uncertain or factually highly improbable. During the time he was under cross-examination the defendant gave evasive answers such as 'I can't racall' or 'I can't remember,' approximately 216 times to questions concerning facts and circumstances that took place in his claimed presence material to the issues in the case.
>
> "The jury, under the instruction of the court, was presented with but one question or issue of fact and that was, had the State shown beyond reasonable doubt that the defendant purposely killed Marilyn Sheppard?
>
> "The State's case is based in part on circumstantial evidence. The law of Ohio on this subject requires that the facts and circumstances upon which the theory of guilt is based must be established beyond a reasonable doubt and the facts so established must be entirely irreconcilable with any claim or theory of innocence and admit of no other hypothesis than

the guilt of the accused. Carter vs. State, 4 Oh. App. 193.

"If, therefore, the jury, after careful deliberation, found that there was any possible hypothesis of innocence, after a consideration of all of the evidence, then the defendant would be legally entitled to be discharged, but if the jury found, after full deliberation, there was no possible hypothesis of innocence based on the facts as they found them to be and that the facts found are such as to be irreconcilable with any other reasonable hypothesis, than the guilt of the accused, then a verdict was required.

"This was a jury question and *we hold that there was sufficient evidence to support the verdict of guilty as found by the jury.*" (Emphasis ours.)

Reference is made in the petition (p. 10) to the injuries allegedly sustained by the petitioner. Petitioner's injuries were the subject of conflicting testimony on the trial. Whatever injuries the petitioner sustained, he claimed they were caused by a blow or blows of the fist of the assailant that he encountered in the bedroom where his wife came to her death as a result of many blows on the head with a blunt instrument. It was on this occasion and only then, that the petitioner claimed that there might have been two assailants, "one working over his wife" and the other striking the petitioner from the back with his fist. While petitioner was "chasing" the "form" to the beach (instead of summoning help for his wife), there was no suggestion that there was more than one object or form in front of him.

Reference is made in the petition (pages 3, 10) to truth serum. To the best of our knowledge and memory (the Bill of Exceptions is now in Washington) nothing was proffered on the trial by the State on this subject, and counsel for the petitioner gives no record ref-

erence. The publicity concerning truth serum occurred in the early days of the murder when the petitioner was being shielded from interrogation.

Reference is made in the petition (p. 11) to the use of the words "grilling" and "third degree" in a newspaper editorial (considered by this Court in the former petition). Those expressions are frequently applied to a thorough interrogation and do not at all necessarily mean the use of force or violence. No one laid a hand on the petitioner. Further, that editorial appeared months before the trial.

In the dissent in the Court of Appeals (Pet. p. 11) it was claimed that the only motive suggested to the jury was petitioner's affection for one Susan Hayes. The State was not required to prove any motive. The only person who was present in that house and who knew the motive for the killing was the petitioner, and he wouldn't talk.

Reference is made in the petition (p. 13) to Mrs. Ahern's testimony that Mrs. Sheppard had told her that the petitioner had discussed the possibility of seeking a divorce from her with Dr. Chapman while in California. There was considerable testimony as to conversations the petitioner had with others (particularly Dr. Hoversten and Miss Hayes) on the subject of divorce, such conversations being in part admitted by the petitioner.

The transcript of the bail hearing which appears in the Appendix to the petition is not complete (Appendix A, s.164). The complete answer of the foreman explaining the "pressure" was as follows:

> "Q. What was the pressure that was placed on you?
>
> A. *Only curious people who wanted to know what we knew on the Grand Jury.*" (Emphasis ours.)

The pressure was for information and not, as suggested, to indict the petitioner.

ARGUMENT.

Introductory Statement.

Due to the broad generalities that are indulged in by present counsel for the petitioner, the wild assertions and faulty assumptions, without a single specific item being cited in support of the claims made, and in view of other statements in the petition which create or tend to create impressions not representative of the true situation that existed in the judicial proceedings of this case in Cuyahoga County, we deem it important to point out to this Court that present counsel for the petitioner had no previous knowledgeable connection with the case by way of representing the petitioner during the investigation of this murder, or participating in the trial, the appeals and on certiorari to this Court. The petitioner had three competent and experienced counsel at that time and four counsel when the case was presented to this Court. And it is not a fact, as present counsel states, that this judgment of conviction has been under constant litigation during the past eleven years. This Court denied certiorari and denied a rehearing in 1956 and there was no further court action except a writ of habeas corpus in the Supreme Court of Ohio in 1959 from the denial of which no appeal was taken to this Court.

Permeating the present petition is a wholesale denouncement of all of the Cuyahoga County public officials who had anything to do with the investigation of this murder and the trial of the petitioner, and as a result had had some publicity. The petition also castigates the news media, particularly the Cleveland Press. Yet, the first we knew that present counsel from out of the state could have done a better job all the way round in the handling of this case, including the handling of the duties of the trial judge,

was when he brought himself to public notice in connection with the case through the various news media. In other words, he is using the case for his own ends, for the very purpose that he condemns in the petition, namely, publicity for himself. It has been our experience that this case has attracted its share of publicity seekers.

After the petitioner was released by the District Judge, a release characterized by the United States Court of Appeals as "improvident," his present counsel really got the Sheppard show rolling on television and in the newspapers, with counsel playing the principal role and publicly threatening libel suits. The publicity that Judge Blythin and the prosecutor received, for example, was picayune by comparison.

REASONS FOR NOT GRANTING THE WRIT.

The decision of the majority of the Court of Appeals sums up the habeas corpus proceeding as follows:

> "The habeas corpus proceeding here involved was commenced in the United States District Court April 11, 1963, charging, as amended, some 23 separate constitutional defects in Sheppard's conviction. Some of these had already been found without merit by the Ohio Courts and others were new. Indicating his view that there were probably other constitutional imperfections in Dr. Sheppard's trial, the District Judge bottomed his decision on four separate grounds,
>
> (1) newspaper publicity before and during the trial denied Sheppard a fair trial,
>
> (2) the trial judge should have disqualified himself,
>
> (3) evidence that Sheppard had refused to take a lie detector test and that another witness had taken such a test was improperly brought before the jury, and

(4) the bailiffs in charge of the jury after the cause was submitted to it improperly allowed individual jurors to make telephone calls to their families. Grounds 1 and 4 were passed upon in the Ohio Court of Appeals and Supreme Court and were found to be without merit. They were also relied upon in the application to the United States Supreme Court for certiorari, which was supported by the same volumes of newspaper publicity as are before us. Ground 2 and part of Ground 3 were first asserted in the instant petition for habeas corpus." (App. A, pp. s.2-s.3.)

I.

PUBLICITY.

A. Pre-trial Publicity.

Counsel for the petitioner infers and assumes with no basis in fact that except for the Editor of the Cleveland Press and his prodding of the public officials to "quit stalling" and arrest Dr. Sheppard, the petitioner would not have been suspected and arrested for the commission of this murder; and, that except for the Coroner and his inquest, the petitioner would not have been indicted. Counsel recites what allegedly took place at the inquest but the record before this court does not contain a record of that proceeding, other than what was testified to by Dr. Gerber. The inquest was held in July and months before the trial.

It should be borne in mind that the legal and constitutional question is whether a fair and an impartial jury was impaneled, or whether a change of venue and/or a continuance should have been granted because such a jury could not be obtained. Counsel for the petitioner avoids that question in his argument. All that his argument amounts to is a diatribe against the Editor of the Cleveland

Press and the Coroner. As to this type of argument, the Court of Appeals said:

> "We need not here decide whether the Bay Village authorities, or the Cuyahoga County coroner or the Cleveland police did or did not need the urging provided by the Cleveland Press. It has not been asserted that the police authorities were without the faults charged to them, although it might fairly be inferred that the Press' meddling probably impeded more than it helped." (App. A, p. s.15.)

The decision of the District Court shows that the court did not independently evaluate the voir dire testimony, as this Court held should be done. The Court of Appeals did, and said:

> "In determining whether Dr. Sheppard has carried the burden of demonstrating the unconstitutionality of his trial, surrounded as it was by pervasive publicity, it is our duty to review independently this voir dire examination of the prospective jurors in the state court. *Irvin v. Dowd,* 366 U. S. 717, 723 (1961); *United States ex rel. Bloeth v. Denno,* 313 F. (2) 364, 372 (CA 2, 1963), *cert. denied,* 372 U. S. 978 (1963); *United States ex rel. Brown v. Smith,* 306 F. (2) 596, 602 (CA 2, 1962), *cert. denied,* 372 U. S. 959 (1963); *Geagan v. Gavin, supra,* 292 F. (2) 246-47. The voir dire examination fills nearly 1600 pages in the record of the present case. Each prospective juror was questioned about his acquaintance with the pretrial publicity, and each of those who ultimately returned the guilty verdict swore that such publicity had created in his mind no opinion as to the guilt or innocence of the defendant and would not affect his deliberations. A reading of the voir dire discloses its thoroughness and careful inquiry as to any effect that publicity might have had on the veniremen. We find it without substantial fault and neither has counsel

pointed to any insufficiency or impropriety in it. * * *" (Pet. App. A, pp. s.11-s.12.)

The Court of Appeals also evaluated the pre-trial publicity, and stated:

> "It should be emphasized that nowhere in the news items is there any hint or suggestion that Dr. Sheppard confessed or admitted his guilt, or any claim that he had a criminal record or had been other than an exemplary citizen, or any clear assertion that the press or the police had any direct evidence of his guilt. Comments to the press by police officials, and even prosecutors, occasionally exceeded the bounds of propriety, but they too revealed no more than that some thought that Dr. Sheppard was guilty. In addition to the pretrail publicity set forth in the District Court opinion, the Cleveland papers also published items emphasizing Dr. Sheppard's protestations of innocence." (Pet. App. A, p. s.15.)

As justification for failing to examine the trial record on the voir dire, the District Court pointed out that in *Rideau v. Louisiana,* 373 U. S. 723, 10 L. Ed. 2d 663, 83 S. Ct. 1417 (1963) the Supreme Court did not examine the transcript of the voir dire in reaching its determination as to prejudice and held in that case that the assurances of jurors on voir dire may be disregarded. But in the *Rideau* case, this Court was there considering conceded circumstances that on the voir dire, counsel for Rideau had requested that certain jurors who later decided the case, be excused for cause, and these challenges for cause had been denied by the trial judge.

Mr. Justice Stewart stated in the majority opinion, in *Rideau,* 373 U. S. at page 725:

> "Three members of the jury which convicted him had stated on voir dire that they had seen and heard Rideau's televised 'interview' with the sheriff on at

least one occasion. Two members of the jury were deputy sheriffs. Rideau's counsel had requested that these jurors be excused for cause, having exhausted all of their peremptory challenges, but these challenges for cause had been denied by the trial judge."

The District Court also cited *Irvin v. Dowd,* 366 U. S. 717, 6 L. Ed. 2d 751, 81 S. Ct. 1639. But again, in the *Irvin* case, the Supreme Court based its findings upon an examination of the trial record and held at page 756, 6 L. Ed. 2d, that it is the duty of the federal court on habeas corpus to independently evaluate the voir dire testimony of the impaneled jurors.

Juror Barrish is mentioned in the petitioner's brief, page 21, together with the reason he gave for having read about the case. The further extended examination of Juror Barrish by both parties is omitted from the petition and the defense omit to state that they accepted Juror Barrish by passing him for cause (R. 115) and that they had peremptory challenges which they chose not to exercise with reference to Juror Barrish.

There was no proof presented to the District Court by the petitioner, and the burden of proof was upon the petitioner, that the jury that was finally impaneled by both sides was not a fair and impartial jury as a result of publicity before the trial. Nor do the decisions cited by the District Court support the proposition that a court may, on habeas corpus, as the District Court has done, determine whether a defendant had a fair and impartial jury impaneled, by reading the newspapers, without regard to what the trial record shows. The court has indulged in speculation and conjecture about the adverse effect certain newspaper articles and headlines, occurring before the trial, may have had upon the jury that was selected in this case, and concludes on that basis alone, without any proof, that the petitioner did not have a fair and impartial jury.

It must be remembered that the Mayor of Bay Village was a close personal friend of the petitioner, as were the police officers in Bay Village for whom he was the police surgeon; that he was whisked off to Bay View Hospital by his brothers without permission before the Coroner or any of the Cleveland police officers arrived; that a protective shield was thrown around him and that the petitioner and his counsel would permit no interrogation except under their own terms and by designated friendly officers; and that the petitioner and his counsel were obstructing the public authorities in what should be the normal investigation of a murder.

It seemed, at least to the newspaper editors, that certain public officials were "sitting on their hands" and were fearful, for one reason or another, of proceeding vigorously in the investigation as they would in any other case. Certainly, these newspapers had a right to criticize what they deemed to be a deliberate attempt to shield the petitioner from interrogation, and a lack of progress on the part of the public authorities in the investigation and solution of this crime. It was inevitable that there would be publicity concerning the petitioner's unwillingness to be interrogated save on his own terms and conditions and that the public officials would be criticized, such criticism of public officials not being the exclusive prerogative of defense counsel, or of the American Civil Liberties Union for that matter. And speaking of that organization, we just read in the Cleveland Press, the newspaper that is being so castigated in the present petition, what obviously is a news release made to the Press by the American Civil Liberties Union and its Ohio affiliate that they have filed a brief with this Court in this case, and the newspaper article quotes extensively from the brief.

The American Civil Liberties Union always make sure that they are given the "freedom of the press" to ex-

pound their views, while at the same time they attempt to deny the right of "freedom of speech" in the press to others, including law enforcement officials. Their theory seems to be that only a "chosen few" such as the American Civil Liberties Union should be given the right of "freedom of speech" in the press, and "freedom of speech," whether a person speaks orally or in writing, is also guaranteed by the First Amendment.

Further, that Union, involving itself in cases in the eleventh hour and not having any knowledgeable connection with the facts, the evidence and the judicial proceedings, wants this Court to lay down rules and principles predicated upon broad generalities and faulty assumptions.

Whether we or the Courts agree or disagree with the opinions expressed by the newspaper editors is entirely beside the point. It is pertinent to ask: What caused the publicity before the trial, and who brought it about?

Marilyn Sheppard was murdered—there could be no doubt about that—and it became the duty of law enforcement officers to thoroughly investigate and to bring to justice the person who murdered her. Much of the publicity injected into the District Court's decision occurred months before the trial took place. The murder occurred on July 4th and the petitioner was not brought to trial until October 18th. A great deal of the newspaper publicity occurring before the trial was inspired by the lack of cooperation of the petitioner with the authorities beginning immediately after the murder of his wife was committed, by the protective shield thrown around him, and by the strategy of his counsel who was hired within hours after the murder. None of the publicity was deliberately promoted by the prosecution.

Any sensational murder such as this brings forth publicity, some more, some less, but in the circumstances of each case, the issue before the trial court is whether a

fair and impartial jury can be obtained. The jurors who sat in the trial of this case were all thoroughly examined and definitely stated that they would give to the petitioner the benefit of the presumption of innocence. They were fully examined so far as defense counsel desired as to any knowledge or information they might have of the case. At no stage of the proceedings in the trial court or on the appeals did the petitioner offer any evidence to prove that any juror was in fact hostile, unqualified or prejudiced by the publicity, and, moreover, a period of two months and a half intervened between the day of the petitioner's arrest and the beginning of the trial.

The presumption is that the jurors followed the instructions of the court. A distrust of the jury without any affirmative showing that they were not to be trusted in following out the court's instructions is what the District Court urges.

Mr. Justice Holmes said in *Holt v. United States*, 218 U. S. 245, at 251 (1910), 31 S. Ct. 2, 6, 54 L. Ed. 1021:

> "* * * If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trials under the conditions of the present day * * *"

In *United States v. Sorcey*, 7 Cir. 151 F. 2d 899, 903 (1945), certiorari denied, 327 U. S. 794, 66 S. Ct. 821, 90 L. Ed. 1021, the court stated:

> "* * * we must not permit the integrity of the jury to be assailed by mere suspicion and surmise; it is presumed that the jury will be true to their oath and conscientiously observe the instructions of the court, * * *"

In *Opper v. United States*, 348 U. S. 84, at 95 (1954), 75 S. Ct. 158, 165, 99 L. Ed. 101, the court said:

"* * * Our theory of trial relies upon the ability of a jury to follow instructions. * * *"

In *Delli Paoli v. United States,* 352 U. S. 232, 242 (1957), 77 S. Ct. 294, 300, 1 L. Ed. 2d 278, the court said:

"* * * Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice."

In the instant case, the prospective jurors were questioned at very great length by both counsel for the State and the defense, and the Court. In fact, there are three volumes of the Bill of Exceptions, totaling hundreds of pages, setting forth such detailed examination. The fact that prospective jurors had read something about the case before they were sworn as jurors did not necessarily disqualify them. We know of no principle of law which excludes such jurors from service merely because they had previously read or heard something about the case. The persons who could hear the evidence without bias or prejudice and could decide the issues fairly and impartially were seated. Those who could not, were excused.

It was held in *Irvin v. Dowd, supra,* 6 L. Ed. 2d, at p. 756:

"It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors

will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Spies v. Illinois, 123 U. S. 131, 31 L. Ed. 80, 8 S. Ct. 21, 22; Holt v. United States, 218 U. S. 245, 54 L. Ed. 1021, 31 S. Ct. 2, 20 Ann. Cas. 1138."

The process of impaneling the jury in the Sheppard case demonstrated that there was no unusual difficulty in securing a fair and impartial jury. The analysis of this process is briefly stated in the opinion of the Court of Appeals of Cuyahoga County as follows:

"The record in this case discloses that a special venire was called for the trial of this defendant as provided by Sec. 2945.18 R. C. Seventy-five names were drawn from the jury box. Of this number, 11 were immediately excused for justifiable reasons or were not found, and could not be summoned (three in number) by the sheriff. Of the remaining 64, 13 were excused because they had formed a firm opinion as to the guilt or innocence of the accused and 10 were likewise excused because they were opposed to capital punishment. Sixteen others were excused for cause.

"The State used four peremptory challenges and the defendant five. As is provided in Sec. 2945.21 the State in a homicide case where there is but one defendant, is entitled to six such peremptory challenges and the defendant a like number so that when the jury was sworn, the defendant left the right to one peremptory challenge unused. From the foregoing analysis of the venire of 75 electors called in this case, four of those called were not needed in

impaneling a jury of 12. Such jury was selected as provided by law and sworn and *accepted* by the defendant to well and truly try and true deliverance make between the State and the defendant.

"The parties agreed to select two alternate jurors as provided by Sec. 2313.37 R. C. The four remaining jurors of the original list, together with an additional venire of 24 summoned as provided by law, were used for this purpose. Of the 24 summoned, eight were called and questioned together with the four from the original venire, in impaneling the two alternate jurors. Of those examined, three were excused for holding a firm opinion of the guilt or innocence of the accused, four were excused as being against capital punishment, one was excused on challenge for cause and each side used one peremptory challenge. (Each side had the right to excuse two prospective alternate jurors peremptorily under the provisions of Sec. 2313.37 R. C.)

"The analysis of the impaneling of the jury in this case where but 16 prospective jurors out of 72 examined could not sit because they had prejudged the guilt or innocence of the accused, clearly shows that there was no difficulty whatever in impaneling a fair and impartial jury." (Appendix, Vol. I, pp. 60a-61a.)

No matter when or where tried, the Sheppard case would have attracted widespread publicity. This was inherent in the very nature of the case itself. The right to grant a change of venue lies in the sound discretion of the trial court. The trial court stated on the motion for new trial in ruling on the denial of the motion for change of venue and/or for a continuance:

"(3) *Denial of change of venue requested by defendant.* The request, when made, was based upon the claim that extraordinary public attention centered upon the case in this county by the various media of news made the securing of a fair and impartial jury

in this county impossible. It is a matter of common knowledge that the case commanded that same attention throughout Ohio and the United States of America. It commanded very much attention throughout the free world. Chief counsel for the defense conceded and asserted this to be a fact and stated fervently that the defendant could not have a fair trial in Ohio, or even in the United States. The only conclusion from that assertion must be that the defendant cannot be tried at all on an indictment for Murder in the First Degree. Such a claim furnishes its own answer.

"Seldom indeed has there been a case about which the average citizen was so confused by the published stories, or more uncertain about what the facts actually were. With present-day means of communication the same precise stories were simultaneously published in every city and county in the State and it certainly will not be denied that Cuyahoga County is the most liberal county in the State and, as a result, the best in which to conduct a trial involving a much publicized charge of crime, whatever its nature. *It is to be borne in mind that no issues which break into flames and which tend to produce passion and prejudice were involved in this cause. No issue of race, corruption, killing an officer, or the like, was involved—what actually was involved was a mere mystery—a 'whodunit.'* The only safe and sure way to determine whether a fair and impartial jury can be secured is to proceed to impanel one. The court reserved ruling on the motion pending such an effort and became convinced, and is still convinced, that an intelligent, sincere, patriotic and fair jury was impaneled. Upon that being accomplished the court overruled the motion and believes such action was not error. Section 2945.06 Revised Code of Ohio provides that a person charged in a case such as this may waive trial by jury and elect to be tried by a panel of three judges. While not challenging the right of a defend-

ant, in a proper case, to a change of venue it does seem that the lack of confidence in any jury anywhere, coupled with the failure to elect to be tried by a panel of three judges, smacks of objection to any trial at all. (Emphasis ours.)

"(4) *Error in denying application for continuance.* The crime charged in the indictment occurred on July 4. Trial started October 18. Defendant's counsel had been engaged and active from a time within hours following the crime and long before defendant's arrest. Seventy-five prospective jurors had been summoned with full knowledge of all counsel long before any application for continuance was filed. The only ground stated for a continuance was 'to permit the extraordinary publicity to quiet down.' It was not claimed that counsel were not prepared for trial nor was any suggestion made as to who was going to 'quiet down' the publicity, nor when or how." (Appendix, Vol. I, pp. 35a-36a.)

There was no assurance that the publicity would not continue if a motion for a continuance was granted. Further, the trial court was not required to speculate as to whether a trial at a later date would result in more or less publicity.

The Constitution provides that the defendant in a criminal case is entitled to a speedy and public trial. As it was, the petitioner was not brought to trial until three and a half months after the crime was committed, and the trial court was not required, in view of the Constitutional provision, to delay the trial indefinitely, otherwise the petitioner could be heard to complain that his constitutional right to a speedy and public trial was violated.

As stated in the opinion of the Supreme Court of Ohio on this case:

"At the outset of the trial, in response to defendant's motion for change of venue, the trial court said:

'The motion for change of venue will be held in abeyance, and we will proceed at 1:15 this afternoon in an effort to determine whether or not we can secure a fair and impartial jury. If we are not able to do that, there will be no question in this court's mind at all but what this case ought to go out of Cuyahoga County, whatever may be the effect of that.'

"At the conclusion of the impaneling of 12 jurors, the motion for change of venue was renewed (for the third time), at which time, in overruling the motion, the trial court said:

'That the best evidence in the world is the effort to select a jury, and what we get here is a picture that has taken almost two weeks of time. The court is thoroughly satisfied that we have a fair and impartial group of people to try this case, and I doubt if under any conditions at any time anywhere in this state you could have a better looking group of people and a more intelligent group of people, as a whole, to try a case of this kind, and the court is thoroughly satisfied that they are a group of fair and impartial people who can properly try this case under the guidance of the court, and I hope he will be able to give them that in the manner that it ought to be given.'

"The same motion, advanced for the same reason, was renewed on five other occasions during the trial, and the trial court in each instance overruled the motion.

"We believe the trial court was justified in those rulings. In Townsend v. State, 17 C. C. (N. S.), 380, 25 C. D. 408, affirmed without written opinion in 88 Ohio St. 584, 106 N. E. 1083, it is said:

'The examination of jurors on their voir dire affords the best test as to whether or not prejudice exists in the community against the defendant; and where it appears that the opinions as to the guilt of the de-

fendant of those called for examination for jurors are based on newspaper articles and that the opinions so formed are not fixed but would yield readily to evidence, it is not error to overrule an application for a change of venue.'

"For example, in Richards v. State, 43 Ohio App. 212, 183 N. E. 36, it was held that the exercise of the right to order a change of venue lies in the trial court's discretion, and that a refusal to order a change of venue without prejudice until it can be determined whether a fair and impartial jury can be impaneled is not an abuse of discretion. See also, Dorger v. State, 40 Ohio Opp. 415, 179 N. E. 143; State v. Stemen, 90 Ohio App. 309, 106 N. E. (2d) 662; State v. Deem, 154 Ohio St. 576, 97 N. E. (2d) 13.

"If the jury system is to remain a part of our system of jurisprudence, the courts and litigants must have faith in the inherent honesty of our citizens in performing their duty as jurors courageously and without fear or favor. Of the 75 prospective jurors called pursuant to this venire only 14 were excused because they had formed a firm opinion as to the guilt or innocence of the defendant. A full panel was accepted before this venire was exhausted, and defendant exercised but five of his allotted six peremptory challenges.

"In the light of these facts, and particularly in the light of the fact that a jury was impaneled and sworn to try this case fairly and impartially on the evidence and the law, this Court cannot say that the denial of a change of venue by the trial judge constituted an abuse of discretion." (Appendix, Vol. I, pp. 110a-111a.)

The District Court states (Appendix, Vol. III, p. 439a) that the Supreme Court of Ohio failed to consider in this case that the circumstances were unusually compelling and the assurances of the jurors could be disregarded, such

as was done in *Rideau, supra.* The Supreme Court of Ohio was bound by Section 2945.83 of the Revised Code of Ohio to review the instant case on the record, not by reading the newspapers. And there were no unusual compelling circumstances in the Sheppard case requiring a disregard of the assurances of the jurors on the voir dire. The petitioner did not confess to the crime, not even over television as was done by the defendant in the *Rideau* case, nor is there any showing in the instant case that any juror sat on the trial who was unqualified or unaccepted by the defense, as was the situation in *Rideau.*

Further, the instant case is not comparable with *Irvin v. Dowd, supra,* upon which the District Court relied. In the *Irvin* case, the prosecutor and police officials issued press releases stating that the defendant had confessed to six murders. At the trial, the jury panel consisted of 430 persons; 268 of these were excused for cause as having fixed opinions as to the guilt of the petitioner; and 8 of the 12 jurors who finally served on the jury admitted on voir dire that they thought petitioner was guilty.

And there is no comparison of the facts in *Irvin, supra,* to the facts surrounding the selection of the jury in the Sheppard case. None of the pre-trial newspaper articles in the instant case contain any releases from the prosecuting authorities that the petitioner confessed. In fact, the petitioner garnered a great deal of publicity before the trial, minimizing any part he may have had in the commission of the murder. Omitted from the selection by the District Court of pre-trial newspaper publicity, is the amount of publicity put out by the defense prior to the trial. Innumerable stories appeared emanating from the petitioner, his counsel, his relatives and his friends, minimizing any claim that the petitioner may have committed the murder. The Court of Appeals has listed some of these favorable stories.

The District Court includes under this finding on pretrial publicity, a newspaper article which appeared in the Cleveland Press, October 23d, entitled "BUT WHO WILL SPEAK FOR MARILYN," (considered by this Court in the former petition), and claims that this article was one of the most prejudicial. (Appendix, Vol. III, p. 436a.) Apart from the fact that there is no showing that the trial jury read the article, there is nothing in the article containing any facts which would be probative of the petitioner's guilt of the crime of second degree murder of which the jury found him guilty on the evidence produced in open court.

The District Court says (Appendix, Vol. III, p. 443a) that an overt example of the prejudice against the petitioner was the newspaper report that "the spectators cheered wildly" and "hugged and kissed the Coroner" when he ordered petitioner's counsel ejected from the inquest. Counsel for the petitioner refers to the inquest held in the school auditorium in Bay Village and proceeds to distort the nature of the proceedings and what occurred. Ignored entirely is the testimony of Dr. Gerber that he had made arrangements for the inquest and had actually issued subpoenas before the Press editorial appeared, and that the reason it was held in Bay Village was that most of the witnesses lived there and it would be convenient.

Untold is the fact that the hearing at the inquest was in perfect order during the testimony of the petitioner, his parents, his brothers, the doctors, Don Ahern and Nancy Ahern, Mayor and Mrs. Houk and the Bay Village officers. There was no disorder until the last few minutes of the last day of the public hearing when Dorothy Sheppard was recalled to testify further. It was brought about by Mr. Corrigan, counsel for petitioner, who sought to direct the reporter to insert certain matters into the record. Mr. Corri-

gan was told not to do so and was cautioned that if he persisted, he would be asked to leave. He not only persisted, but ordered the reporter to make the insertions in the record, refused to desist when so requested, refused to sit down when so requested and challenged the authority of the Coroner to put him out. The Coroner had no alternative and was obliged to have Mr. Corrigan removed from the hearing room.

This occurred within a few minutes before the close of the hearing. Furthermore, the inquest was held on July 22d, 23d and 26th and there was at that time no indictment against the petitioner. The disturbance at the inquest which Mr. Corrigan created has no possible bearing on the trial of this case, nor did it prevent the petitioner from having a fair and impartial jury, nor is there any showing that the individuals who showed affection for the Coroner at the inquest, sat on the jury.

It is suggested in the petition (p. 18) that *Estes v. Texas*, 14 L. Ed. (2d) 543 (1965), applies to the inquest held by the Coroner. The events of a two-day pre-trial hearing in court on motions to prohibit television coverage and to postpone the trial were the subject of consideration in that case. The Coroner's inquest was held months before the trial, not in court, and has no bearing on whether the petitioner was denied due process on the trial.

And of a certainty, there is no proof in the record, nor was any affirmative proof presented to the District Court by the petitioner, no "demonstrable reality," that the jury selected in this case was not a fair and impartial jury, or that the publicity before trial influenced the jurors who were finally selected by both sides on the two-week searching voir dire examination. The District Court's finding to the contrary is merely a matter of speculation, with no basis in fact.

B. Publicity During Trial.

Counsel for petitioner again indulges in inferences and faulty assumptions with nothing specific being shown that a fair and an impartial jury was not maintained during the trial. And, had the District Court examined the record, it would have found that counsel for the petitioner who were present throughout the trial and who were in a position to know and observe, were satisfied that they had a fair and impartial jury that was not being influenced by anything other than the evidence and the repeated instructions of the trial judge, for counsel for the petitioner stated to the jury in argument:

> "May I take this opportunity—as I started to say, may I take this opportunity to congratulate you on the splendid attention, the tireless effort you have displayed during these nine weeks. You have been deprived, probably, of many comforts that you ordinarily enjoyed in and around your home with your family because of the *admonitions* that you have received throughout the trial by his Honor, Judge Blythin.
>
> "The purpose, ladies and gentlemen, of those admonitions was that we could come to this point in the lawsuit where your minds would be free, your minds would be open, and that you could take into consideration all the facts and all the testimony that has been submitted to you *without any outside influence*, and I am sure, and I say this to you sincerely, *because I have had the opportunity of observation during this entire period, that you have done just that.*" (R. 5371-5372.) (Emphasis ours.)

The District Court said, "If ever there was a trial by newspaper, this is a perfect example." (Appendix, Vol. III, p. 453a.) The court should become acquainted with the facts as reflected in the record, showing who was largely

responsible for the publicity during trial. Certainly, there is no evidence that either the trial judge or the prosecution were trying the case in the newspapers. Dr. Steve Sheppard, petitioner's brother and a prospective witness, so persisted in trying to have the petitioner's case tried in the newspapers that the trial court was required to admonish him that if he did not desist, he, being a witness, would be excluded from the courtroom (R. 3722). This all took place in the Court's chambers just before the Considine broadcast was brought to the attention of the court, and the Court said:

> "Let it be now understood that if Dr. Steve Sheppard wishes to use the newspapers to try his case while we are trying it here, he will be barred from remaining in the court room during the progress of the trial if he is to be a witness in the case." (R. 3722.)

During the trial most of the publicity was given out by the defense. Petitioner had a former newspaperman as one of his counsel, and as a former newspaper man, defense counsel knew very well how to get favorable stories in the public press, and he was quite successful. He held press conferences daily, and frequently more than once each day; and, with his client, posed for hundreds of pictures which, together with favorable personal stories, appeared in all types of news media. The amount of publicity so put out by the defense was enormous, and far outshadowed the attention given the State. Defense counsel found that by continually denouncing the newspapers and public officials, he could get an even greater amount of publicity. Mr. Corrigan's skill in the art of publicity is demonstrated by the innumerable stories that appeared, emanating from the petitioner, his counsel, his relatives and his friends. The bales of newspapers offered by the defense in support of their motions show these favorable

personal stories and the innumerable photographs for which the petitioner and his counsel posed.

Mr. Corrigan also demonstrated his accomplishments as an actor by pretending to object to the pictures and reading his objection into the record. The photographs themselves, and the stories which accompanied them, show complete acquiescence and pleasure. That the objection made for the record was without justification and mere pretense is proved by the testimony of Julian Wilson during the hearing on the motion for new trial. Mr. Wilson was a photographer for the Associated Press, assigned to this trial, and testfied on the motion for new trial that he made many pictures of Dr. Sam Sheppard and considerably over a hundred of Mr. Corrigan (R. 7088). His testimony speaks for itself:

"Q. Now, did you take any pictures in this court room while the court was in session?

A. No, sir, I did not.

Q. Now, while the court was not in session, during recess or after adjournment, did you take pictures in this court room and around this building?

A. Many times.

Q. Did you take pictures of Mr. Corrigan?

A. Yes, sir.

Q. About how many times?

A. Roughly—it would run considerably over a hundred negatives.

Q. About a hundred negatives. And of Dr. Sam Sheppard?

A. I made many pictures of him.

Q. And Mr. Garmone?

A. He, too, I have made many pictures of.

Q. Now, did Mr. Corrigan ever object to your taking any of these pictures?

A. A few times he has objected.

Q. When was that?

A. About the middle of the trial or towards the

end of it, Mr. Corrigan—we were instructed that Mr. Corrigan didn't want any pictures made of himself, the defense, or the defendant.

Q. How many pictures had you taken without his objection before you received those instructions?

A. Oh, many.

Q. More than 50?

A. I'd think so.

Q. And after you received the instructions, did you stop taking pictures?

A. Yes, sir.

Q. And how long did that continue?

A. About a week and a half, two weeks.

Q. Then what occurred?

A. We asked Mr. Corrigan's permission.

Q. And did you get it?

A. Yes, sir.

Q. And then resumed taking pictures?

A. Yes.

Q. How many pictures did you resume taking—did you take after you resumed taking those pictures?

A. I'd say not as many as before because we didn't need as many pictures.

Q. More than 20 or 25?

A. About that.

Q. Now, with respect to the defendant, Dr. Sam Sheppard, is the number of pictures that you took before the objection by Mr. Corrigan about the same as what you took of Mr. Corrigan?

A. About, yes.

Q. You took about 50 before. Then there was this period when you didn't take any pictures because of the objection, is that correct?

A. That's true, sir.

Q. And then did you later resume?

A. Yes, sir.

Q. With whose permission?

A. Well, when we got Mr. Corrigan's permission, we resumed taking pictures.

Q. And about how many did you take after you got permission?

A. Somewhere around 15, 20, 25.

* * *

Q. Did you ever take a picture of either Dr. Sam Sheppard or any of his counsel over their objection?

A. No, sir.

* * *

The Court: May I have just one question? Were you present at the conference which the Court had with photographers prior to the opening of the case?

The Witness: Yes, sir, I was.

The Court: And at which the Court stated what the rule would be as to taking pictures during the trial?

The Witness: I was.

The Court: Do you recall what that was as to taking pictures within the court room and of the defendant and his counsel?

The Witness: Yes, I do recall.

The Court: All right. State it.

The Witness: Your ruling, sir, was that no pictures would be made at any time when the court was in session, and you also requested that we make no pictures of the defendant or the defense or anyone without their permission. I believe that is the gist of the thing.

The Court: That's correct." (R. 7087-7091.)

It is obvious from the record that objections by the defense to the newspaper publicity were quite pro forma and mere pretense.

The District Court injects into its decision (Appendix, Vol. III, pp. 444a-445a) a newspaper article and certain newspaper headlines, as though they were before the jury as evidence in the case, and concludes that the petitioner was prejudiced by being referred to in the newspaper

article as a Dr. Jekyll and Mr. Hyde, and that such headlines were slanted against the petitioner. This article was considered by this Court in the former petition. There is no proof nor was there any proof before the District Court that the jury read this article or were influenced by it in reaching their verdict. This witness did testify but did not disclose such an incident.

On the voir dire, at the outset, the court instructed the prospective jury that the defendant was presumed to be innocent unless and untill he was found by a jury to be guilty of the crime beyond a reasonable doubt and that finding was to come, not from anyone's notions or outside information, but must come on the basis of testimony heard from the witness stand (R. 31). The prospective jury were further instructed that they were not to discuss this case or any feature of it with anyone; that they were not permitted to have anyone speak to them about it; that they were not to remain anywhere where other people were speaking of it among themselves; and that they were not to speak of it among themselves (R. 35). The prospective jury were also questioned concerning newspaper articles and radio broadcasts and whether they would be influenced or swayed by anything anybody said outside of the court room (R. 167-168, 214).

The prospective jury were also questioned as to whether they would consider the question of the guilt or innocence of the defendant solely on the basis of the evidence that was received in the courtroom from the witness stand (R. 236). And they were further questioned as to whether they would follow the instructions of the court not to read anything about the case in any of the newspapers and not to listen to any discussion of the case on the radio or television (R. 279).

The court said to the jury at Record 1452:

> "A fair and an impartial juror is a juror who can sit here patiently and who can listen to all of the evidence that is produced in a case and to the instructions of the court as to the law applicable to the particular case, and who can honestly close out the rest of the world for the moment and bring a curtain down on all information he may have about the matter from other sources, and be guided entirely by the evidence and the instructions of the court as to the law applicable to the particular case" (R. 1452).

And when the jury was impaneled, the court instructed the jury not to talk about the case to anyone; not to permit anyone to talk to them about it; not to remain anywhere where other people were talking about it themselves, in the jury room or elsewhere; that it was each one's duty as an individual juror and responsible citizen to keep his own counsel, to listen to the evidence that came from the witness stand and the instructions of the court as to the law, and wait until all those are complete before they formed any opinion or judgment whatever as to the outcome of the case, which opinions and judgments were to be expressed only in the jury room after the case was finally submitted to them for deliberation and decision. The jury were further told by the court that during the pendency of the trial, they were not to listen to comments about it over the radio or otherwise and not to read the newspapers (R. 1591). The court said: "You will get here the only facts that you are to consider in the determination of this case" (R. 1592).

Each juror had agreed that he or she would disregard everything other than the evidence received in open court and would, in conformity with the instructions of the court, render a fair and impartial verdict. The jurors took the

oath required by law and there is not a shred of evidence in the record, nor was there any affirmative proof before the District Court that each and every juror did not fully and completely abide by the oath so taken.

There is not a particle of evidence in the record or before the District Court to show that the jury was in any way influenced by reports or stories in the newspapers or over the radio, or anything else, or that the jury or any juror was biased or prejudiced by any such stories or broadcasts.

Although several jurors were subpoenaed and were thoroughly interrogated by defense counsel on the hearing on the motion for new trial, not a word of testimony was produced to justify the claim that the jurors were influenced by anything other than the evidence produced in open court in reaching their verdict. The District Court's finding that newspaper publicity during the trial prejudiced the petitioner is based upon mere speculation and suspicion, with no basis in fact. Certainly, it is not supported by the record. A fair and objective analysis of stories to the public will disclose that they made no effort to slant the stories, certainly not to influence the jury in arriving at their verdict. Nor is there any proof whatsoever offered by the petitioner that the jury was influenced by anything other than the evidence produced in court in reaching its verdict.

The District Court holds that the trial judge committed error when he failed to question the jury regarding the Robert Considine broadcast. This incident was before this Court for consideration in the former petition. Urged for the first time in the Supreme Court of Ohio by the defense, as error, was the refusal of the trial court on motion for continuance in the 5th week of trial to ask the jurors if they heard a broadcast by Bob Considine over Station

WHK in which there was something said about the Sheppard case. This matter was brought up in the court's chambers and neither the court nor the prosecutors had any knowledge whatsoever of the alleged broadcast. Mr. Corrigan, counsel for the petitioner, complained that Bob Considine had paralleled a denial of the petitioner as set forth by Officer Schottke with a denial of Alger Hiss when he was confronted by Whittaker Chambers, without stating that Dr. Sheppard was in bed in the hospital at the time of his denial, while Mr. Hiss was strong, mentally and physically.

Apart from this assertion of counsel, no proof whatever was submitted to the court as to the exact nature of the broadcast, although Mr. Considine was available, it being conceded by the defense that he was in daily attendance at the trial. When the court stated: "We are not going to harass the jury every morning," Mr. Corrigan then responded, "I can't help it, Judge. If you don't that's all right with me. I make my exception." (R. 3725.)

That it was not error for the court to refuse to interrogate or poll the jurors during the trial as to whether they had read a newspaper article or heard a radio broadcast such as the Considine broadcast, is affirmed by the annotation in 15 *A. L. R.* (2) 1152, wherein it is stated:

> "The present annotation is concerned with the question of whether, during a criminal trial, the jurors may be interrogated or polled as to whether they have read newspaper articles pertaining to the alleged crime or the trial. As the title indicates, the annotation involves the propriety of interrogation or polling after impanelment, as distinguished from that which occurs on voir dire examination.
>
> "The few cases that involve this specific point all uphold the trial court where it refuses to interrogate, or refuses to let a party interrogate, the jurors as to

> the reading of newspaper articles relating to the trial or the crime. The decisions generally turn on the fact that the trial court had instructed the jury not to read the articles or that there had been no showing by the moving party that the jurors had in fact read them."

Whatever the news media, whether it be newspapers or radio broadcasts, the same principle should apply. As stated in *Trombley v. Langlois* (R. I.), 163 A. 2d 25 (1960):

> "An impartial trial is one in which jurors reach a verdict upon a consideration of only those matters that were introduced in evidence during the trial and matters not so introduced, should not be brought to their attention through an interrogation of the jury to determine whether they have knowledge of allegedly prejudicial material published in the newspapers."

In *State v. Hilliard,* 89 Arizona 129, 359 P. 2d 66 (1961), it was held that the granting of the defendant's request for interrogation of jurors during trial as to whether they had read newspaper accounts, rested in the sound discretion of the trial court and refusal to permit poll was not error.

It was held in *Ford v. U. S.*, 233 F. 2d (C. A. 5th Tex.) 56 (1956) that it is within the discretion of the trial court, whether after impanelment during criminal trial, the jurors may be interrogated as to whether they had read newspaper articles. Refusal of trial judge to permit interrogation of jury regarding article was not error, where court instructed jury at beginning of trial not to read "any stories in the newspapers about the case."

Reference is made to publicity of the family of Juror Lois Mancini. This incident was considered by this Court in the former petition. Furthermore, Lois Mancini was not present during the visit of the reporter and did not participate in the interview. We wish to also note that she

was merely an alternate juror and did not participate in the deliberations or the verdict.

The District Court comments that during the trial there was a broadcast by Walter Winchell in which he related the story of a woman in New York who claimed she had been a mistress of Sam Sheppard (Appendix, Vol. III, p. 450a). This incident was referred to in the previous petition. At the request of defense counsel, the court inquired of the jurors whether they had heard the Winchell broadcast and two jurors responded that they had. The jurors had no knowledge that Mr. Winchell was to broadcast anything at all pertaining to the Sheppard case or to Sam Sheppard. The two jurors who heard the broadcast were asked by the Court: "Would that have any effect on your judgment?" Both answered, "No." The Court stated:

> "Have any of you, other than these two ladies, heard anything about that broadcast last night? And I wish to ask you two ladies in particular, and all of you in general, to pay no attention whatever to that kind of scavenging. It has no place, in my judgment, on the air at all, but that is not for me to determine, but surely it has no place whatever in our thinking or considerations or thoughts in any way, shape or manner in this case. Let's confine ourselves to this court room, if you please." (R. 5429-5430.)

Upon the hearing on the motion for new trial and even though several of the jurors had been subpoenaed, the defense produced not a word of testimony to support their claim that the jurors heard the Considine broadcast. There is in the record no proof that any of the jurors were influenced by this broadcast or the so-called Winchell broadcast, or by anything else other than the evidence produced in open court.

The Court of Appeals stated:

"The presumption that obedient to instructions, the jurors ignored publicity during the trial has not been overcome by petitioner. The only showing that any of them encountered any of this publicity came when the trial judge questioned the jurors about a Winchell broadcast during the trial attributing marital infidelity to Dr. Sheppard. Two jurors advised that they had heard the broadcast, but would not be influenced by it, and an appropriate admonition on the subject was given by the judge. Defense counsel also requested interrogation of the jury as to their knowledge of another broadcast in which one Considine made remarks derogatory to Dr. Sheppard. The trial judge refused this request, observing that he did not think the jury should be harassed with interrogation each morning. We believe that this action was itself within the discretion of the judge, and that it may indeed have been the best thing to do. A discreet judge might well conclude that repetitive reference and inquiry as to matters prejudicial to the defense would harm rather than help. A substantial number of lawyers skilled in the art of advocacy would, we think, agree. Compare *Estes v. United States,* 335 F. (2) 609, 615 (CA 5, 1964), *cert. denied,* 379 U. S. 964 (1965); *United States v. Provenzano,* 334 F. (2) 678, 696 (CA 3, 1964), *cert. denied,* 379 U. S. 947 (1964); *Ford v. United States,* 233 F. (2) 56, 61-62 (CA 5, 1956), *cert. denied,* 352 U. S. 833, 1 L. Ed. (2) 53 (1956). In any event, any effect that this limitation of interrogation during trial might be thought to have is dissipated by the opportunity accorded defense counsel to interrogate jurors on their motion for a new trial. Three of the jurors were thus questioned, but counsel did not see fit to inquire into possible contacts with trial publicity." (Pet. App. A, pp. s.29-s.30.)

It is claimed that the trial court had a duty sua sponte to sequester the jurors. There is no requirement under the

laws of the State of Ohio that a jury be sequestered during the trial. In fact, the Ohio statute makes it a matter of discretion on the part of the trial court. Section 2945.31 of the Revised Code of Ohio provides:

> "After the trial has commenced, before or after the jury is sworn, the court may order the jurors to be kept in charge of proper officers, or they may be permitted to separate during the trial. If the jurors are kept in charge of officers of the court, proper arrangements shall be made for their care, maintenance, and comfort, under the orders and direction of the court. In case of necessity the court may permit temporary separation of the jurors."

With the trial lasting over two months, there is no showing that the trial court abused its discretion, nor was there any request by the defense that the jury be sequestered during the trial. To keep the jurors from their families for that length of time would have imposed an unnecessary hardship upon the jurors. Further, the fact is that there is no affirmative evidence, nor did the petitioner offer any proof, and the District Court points to none, that any juror read any of the alleged prejudicial newspaper publicity during the trial, contrary to the instructions of the trial court. No claim was made by the defense in the state courts or on certiorari that the trial court abused its discretion in not sequestering the jury during the lengthy trial. Again, whether a jury should be sequestered is a matter of state legislation giving the trial court discretion.

Counsel for the petitioner cites *Estes, supra,* as applicable to the fact that the jury was not sequestered in the instant case. The *Estes* trial was a short trial and held under Texas law. Defense counsel in the instant case could have objected to any sequestration of the jury. The Court of Appeals pointed out:

"* * * We cannot speculate now whether able defense counsel would have welcomed such a procedure, or whether long insulation and confinement of a jury trying a first degree murder case might be thought more likely to lead to conviction and a death penalty than permitting the jury the relaxation and refreshment of living at home, even with the possible exposure to extracurial publicity." (Pet. Appendix A, s.9.)

The Trial Court stated on the hearing on the motion for new trial:

"While this Court would not for the world minimize the importance of guarding this jury—or the jury in any other case—from annoyance or influence, he must express the thought that human beings, whether serving as jurors or not, cannot be wrapped in cellophane and deposited in a cooler during trial and deliberation.

"The jury in the instant case was jealously guarded throughout the entire proceedings and it is worthy of note—and indeed decisive in this Court's judgment, that not a suggestion of influence upon the jury is forthcoming from any person or agency. Interference or influence must be the test. If we are to convict jurors without a scintilla of evidence of undue influence on them, it is now pertinent to halt and ask ourselves what becomes of our faith in our decent fellow-citizens and of what value is the jury system at all.

"It is claimed that the jurors were permitted to separate on one or two occasions within the period of their deliberations and were so photographed. Foreman Bird and Bailiff Francis testified that the so-called separation of jurors was merely their momentary division in the dining room of the hotel for the purpose of photographing the men in one group and the women in the other. It was in the presence of the

two bailiffs, was only a few feet in extent and there was no communication of any kind with the jury by the photographer. To term such a petty detail a 'separation' is stretching the imagination to a dangerous point. It certainly is not the separation prohibited by law and is hardly worthy of serious thought or comment.

"The Court had complete confidence in the jury in this case; it was protected at all times from any possible approach, and its every movement and conduct would seem to be an eloquent demonstration of the fact that it proved itself worthy of the confidence placed in it to faithfully carry out the admittedly tremendous responsibilities entrusted to it." (Appendix, Vol. I, pp. 44a-45a.)

The District Court claims that special note must be given to the attempt of the newspapers to influence the jury by taking photographs of the jury so that they would look for their photographs in the newspaper and thereby expose themselves to the prejudicial reporting (Appendix, Vol. III, p. 453a). On the motion for new trial, the trial court stated:

"Jurors were flash-photographed in their comings and goings and it is difficult to know how that can be prevented even if, indeed, it should be. Jurors are human beings and become citizens of special importance when undertaking a signal public service. Not a single complaint was registered by any juror in this connection and it is worthy of note that the defense does not even claim that any juror was affected in the least by it. Furthermore, they were not flashed by agents of the State nor on its behalf. Such exposures to public attention are not matters of prejudice for or against either the State or defendant but matters of news interest to newspapers. They remain wholly neutral if fed sufficient news or pictures of interest." (App., Vol. I, pp. 40a-41a.)

The District Court comments that the newspaper ran editorials praising the trial judge and that he was a candidate for re-election; that this certainly was an attempt to bring him around to their way of thinking. (Appendix, Vol. III, p. 453a). And counsel for the petitioner infers in his argument to this Court, that if the trial judge had not been running for re-election to retain his post, and the prosecutor had not sought election to the bench, the petitioner would not have been convicted of this crime.

The state judge was not the trier of the facts in this case. The verdict on the facts was rendered by a jury. Nor is there any showing that the trial judge or the prosecutor were, as a result of running for election, denying due process to the petitioner. The Court of Appeals appropriately said:

> "Much has been made of the fact that the Sheppard trial begun on the eve of a judicial election at which the trial judge and one of the prosecution staff were candidates. We must assume that this is emphasized to imply that desire for victory may have led the jury to conduct prejudicial to Dr. Sheppard's rights. We would have to entertain a low estimate of the integrity of our fellow judicial officers to join in any such inference. In most of the states of the Union it is traditional that those who occupy judicial office be required from time to time to account for their stewardship by submitting to election. If it is suggested that we presume that an elective judiciary can preserve constitutional rights only at some undefined distance in time from election day, we reject such suggestion out of hand. As realists we know that those who seek reelection to judicial office hope that their conduct will find public approval, but we do not think that judicial *misconduct* would be more attractive to the electorate than conduct marked by the integrity which we as judges like to believe is

possessed by elected judges as well as those who have the security of tenure during 'good behavior.' Nor are we prepared to presume that any judge is so far enamored of his position as to betray its responsibilities, no matter what he thinks would most please the electorate. Additionally, it is not inappropriate to note that much of the publicity complained of, and the actual taking of testimony at Dr. Sheppard's trial, occurred *after* the election had been held. For like reasons, we must reject Dr. Sheppard's repetition in this Court of his broadside charge 'that the elective judges of Ohio were so biased and prejudiced against him that he could not expect fair adjudication of his case in state courts. * * *' " (Pet. App. A, pp. s.41-s.43.)

The District Court claimed that the requisite atmosphere for a fair trial did not exist. Counsel for the petitioner has submitted a wholly distorted picture of the arrangements made by the trial court before trial to govern the news media. For a fair and objective statement pertaining to such arrangements, we direct the attention of this Court to the words of the trial judge in his memorandum on the motion for new trial.

Regardless of what action was taken by the trial court, it was certain that all of these newspaper reporters were to be present and that demands would inevitably be made upon the trial court by all types of news media. When the affidavit in support of a motion for new trial (App. A, pp. s.158-s.164) was filed with the trial court, the trial Judge stated, in ruling upon the motion for new trial:

"Realizing that the case had caught the public imagination to an extent leading national and, indeed, international news media to decide to fully 'cover' the trial, and having requests for space for many of them, the Court decided to make proper arrangements before trial and to control the situation so as

to minimize and, if possible, eliminate confusion during the trial. The court room is small.

"The Court assigned specific seats to individual correspondents in the rear of the court room and back of the trial area, and issued orders that there was to be no crowding or congregating at the front end entrances (one on each side of the bench) of the court room; that there was to be no passing back and forth through the trial area and that all entries to and moving out of the court room be via the public doorway in the rear of the court room. Members of the defendant's family were accommodated with seats at all times during the trial. The same was accorded members of the family of the murdered Marilyn. Members of the general public were admitted to the extent of the seating capacity of the court room and a scheme of rotation was established so that many persons attended some sessions of the trial and no favored members of the general public were present at all times, nor permitted to be.

"Rules were prescribed for photographers and representatives of radio and television stations. They were cautioned that no cameras were to be permitted in the court room excepting in the morning before the convening of court and at the close of the day after adjournment, and that in no event were pictures of the defendant to be taken in the court room at any time excepting with his consent or that of his counsel.

"The Court's arrangements and orders were carried out with one or two simple insignificant exceptions, due to over-enthusiasm. The defendant and his chief counsel were far more gracious to the press, photographers and gallery than was the Court. A very large number of pictures of the defendant, his family, counsel and friends were taken in the court room (outside of court session periods) with their permission and without complaint. Counsel for the

defense held press conferences in the court room with cameras clicking; all to the apparent delight of counsel for the defense, and, naturally, without protest.

"Julian Wilson, a photographer for the Associated Press, testified on this point at the hearing had on the motion and supplemental motion. His testimony stands wholly unchallenged and it states the procedure followed with perfect clarity.

"* * *

"Some space outside of the court room which could be spared for the moment without interference with the public service was used by publicity agencies for their typewriters and other equipment but it is definitely not true, as stated in the motion herein, that:

> 'The Assignment Room, where cases are assigned for other causes to court rooms, was assigned by the Court to reporters and telegraphers.'

"Some generally unused space in the Assignment Room was so assigned. Neither person, record, nor piece of equipment in the Assignment Room was moved, removed or displaced and the Assignment Room functioned normally throughout the entire period of the trial of this cause. One of the real purposes of assigning that space to the uses mentioned was to remove them entirely from the immediate court room area. They were out of the corridors leading to the court room and permitted free movement of the public and visitors within the building, whether there in connection with this case or otherwise, wholly unaffected by the Assignment Room space activity." (Appendix, Vol. I, pp. 39a-41a.)

The Ohio Court of Appeals in its opinion, stated:

"It is claimed also that the court arranged the courtroom to accommodate a great many representatives of the press, radio and television and other news-disseminating agencies, thus restricting accommodations available for others. The record shows

that the defendant's family was provided for and that the defendant's brother Dr. Stephen Sheppard, although a witness, was permitted by order of the court to remain in the courtroom throughout the trial. The court in this case was presented with a very difficult matter because of the unusual amount of coverage attempted by the press, radio and television agencies. The arrangements made by the court were within its sound discretion. Certainly the defendant was afforded a public trial, and from a reading of the record, we cannot say that the court in seeking to maintain an orderly proceeding abused its discretion in directing the courtroom arrangements." (Appendix, Vol. I, p. 84a.)

The Court of Appeals stated:

"The District Judge also concluded that news coverage of the trial deprived petitioner of his constitutional rights because it contributed to a 'carnival atmosphere.' Stress is laid on the manner in which the trial judge allocated the seating available in his small courtroom, giving most of it to the press and installing special tables for them. Now, with the reflection and the hindsight that an interval of ten years has provided, and after all of the appellate tribunals have found the judge's conduct in this regard without constitutional fault, it is asserted that the trial judge should have done a better job. We are not told what alternative measures he should have adopted. Certainly he was without power to slake the public interest. Should he then have selected news representatives who would be regularly favored with admission to the courtroom, and let each day's trial begin with a scramble by the unfavored to gain access? Should he have moved the trial out of the courtroom into some public hall or auditorium where the public and the press could be accommodated at a greater distance from the jury and counsel? Shall we now speculate whether such planning would have reduced or augmented the so-called 'carnival atmosphere'? It is as-

serted also that too many photographs were taken of the jury, the defendant, and counsel. No photographs were allowed to be taken in the courtroom while the court was in session. In view of today's increasing dissatisfaction with the aggressive performance of many of the news media, it may indeed be regretted that the trial judge did not enforce more rigid discipline of its representatives. But we can no more find impropriety of constitutional magnitude in what occurred than could the other appellate courts that have been challenged to do so.

"The claim that the trial judge contributed to a 'carnival atmosphere' is further supported by emphasis on the installation in the courtroom of a microphone and loudspeakers. This is surprising in view of the fact that it has become regular practice to install such electronic equipment in modern courtrooms, including those occupied by the United States District Courts. We find no merit in this claim." (Pet. App. A, pp. s.30-s.31.)

The Court of Appeals said further:

"The opinion of the District Court additionally criticizes activities of the press as follows:

'The Court need not be naive, and it does not stretch its imagination to recognize that one of the purposes of photographing the jurors so often was to be assured that they would look for their photographs in the newspapers and thereby expose themselves to the prejudicial reporting. Also, the newspapers ran editorials praising the trial judge (he was a candidate for re-election) and published photographs and sketches of him in at least 46 separate issues. *This was certainly an attempt to bring him around to their way of thinking.*' 231 F. Supp. 63. (Emphasis supplied.)

"Even if we were to join in the apparently gratuitous inference as to the press' motives, we have just examined the reasons why we cannot join in the presump-

tion that the jurors violated their oaths and instructions by examining the trial publicity. Nor are we willing to assume the judicial venality or timidity we would have to assume to find any effect of such publicity on the judge in the face of a record which is entirely devoid of any evidence of trial misconduct on his part." (App. A, pp. s.31-s.32.)

When present counsel speaks of "substantial disruptions," "distractions" and a "volatile" atmosphere at the trial, he is not talking from any personal knowledge, nor does the record substantiate his claims. It should be remembered that this trial continued for some nine weeks and that, necessarily there are times when people are required, for one reason or another, to leave the court room.

The reference by the Ohio Supreme Court to the words "Roman holiday" merely described the widespread publicity furnished by the news media to the public at large and had no reference to the conduct of the trial itself, nor to the proceedings in the courtroom. The expression is also used to mean a "good time" or "field day." It by no means follows that the news media slanted the news or even tried to do so to prejudice or to convict the petitioner. As clearly indicated by Judge Bell in his opinion, it was a case involving "murder and mystery, society, sex and suspense." The curiosity of the public, excessive though it may have been, necessarily brought about the widespread publicity.

All we have in the instant case in the finding of the District Court that the jury was not a fair and impartial jury is suspicion, surmise, conjecture, and a general distrust of the jury with no basis in fact that the jury was not to be trusted to render a fair and impartial verdict based solely upon the evidence produced in court and the instructions of the court on the law applying to the evidence.

II.

DISQUALIFICATION OF THE TRIAL JUDGE.

The District Court made a finding that the trial judge should have disqualified himself. (App., Vol. III, p. 456a.)

This finding is based solely upon the unsworn statements of the New York gossip columnist Dorothy Kilgallen Kollmar to whom the trial judge allegedly said before the trial, "Well, he (Sheppard) is as guilty as hell. There is no question about it." (App., Vol. III, p. 457a); and Edward Murray, an employee in the office of the Clerk of the Common Pleas Court of Cuyahoga County, to whom the trial judge allegedly said months before the trial, "Sam Sheppard is as guilty as he (the judge) was innocent." (App., Vol. III, p. 386a.)

It is a matter of common knowledge around the Court House in Cuyahoga County that Ed Murray was a patient of the petitioner's brother, Dr. Steve Sheppard, and has a son in the same osteopathic field, who interned at the Sheppards' hospital.

It was also well known among the news reporters at the Criminal Courts Building during the trial, that Dorothy Kilgallen Kollmar was not on friendly terms with the trial judge and if anybody made a disturbance during the proceedings, she did. Judge Blythin had warned her that she would be barred from the courtroom if she did not obey his rules. She was always arriving late and rushing around to get material in a hurry for her noon lead. If anyone slanted their news stories, she did, in favor of the petitioner. In the Cleveland News, December 1, 1954, is the headline *"Portrait of Dr. Sam One of Variance"* in which article she compares Sam with Marlon Brando and his profile to Henry Fonda. In the Cleveland News, December 2, 1954, appears her headline *"Pats Defense for Evidence Analysis."* And when the verdict was returned in this case,

she headlined it in the New York Journal American as a "miscarriage of justice."

A third unsworn statement was made by Mr. Garmone, one of the three trial counsel (Appendix, Vol. III, p. 382a), which shows that defense counsel were satisfied that the trial judge would be fair and impartial in the handling of the trial, and that no affidavit of bias and prejudice was filed against the trial judge. This statement is shunted into a footnote in the District Court's decision (Appendix, Vol. III, p. 461a), apparently because it did not support the finding of the District Court that the trial judge should have disqualified himself. While Judge Blythin's son was a member of the Cleveland Homicide Bureau, he did not participate in the investigation of this crime. The trial record shows who the investigating officers were.

We do not find that Dorothy Kilgallen's statement is a matter of record in the District Court. The Appendix, Vol. III, pp. 388a-392a, shows her statement in which it is stated: "By agreement of counsel, no oath is administered since the integrity of the witness is not in dispute." The statement was taken on May 9, 1964 in New York, but how the District Court obtained the statement is not a matter of record. She was not cross-examined.

On the basis of this highly incompetent matter which would have no standing in any court, the District Court impugns the integrity of the state trial judge. The District Court concludes that these unsworn statements are uncontroverted evidence in this case and must be accepted as being true. (Appendix, Vol. III, pp. 458a-459a.) Upon what legal basis must they be accepted as being true?

The statements do not even rise to the level of affidavits, and even if they had been made under oath, it has been held that issues of fact cannot be established in

habeas corpus proceedings by ex parte affidavits; *Walker v. Johnston*, 312 U. S. 275, 285, 85 L. Ed. 830, 61 Sup. Ct. 574 (1941); *Moses v. Hudspeth*, 129 F. 2d 279, 280 (10th Cir.) (1942), certiorari denied in 317 U. S. 665, 87 L. Ed. 534, 63 Sup. Ct. 73; *Jones v. Cunningham*, 313 F. 2d 347 (4th Cir.) (1963).

To have to resort to this type of incompetent evidence to upset the state court conviction, we believe, shows bias and prejudice on the part of the District Judge against the state trial judge. Further, the District Court knew that there is no way of rebutting these statements since the trial judge has been deceased for some years. To honor these unsworn statements is analogous to denying cross-examination. Waiting for some ten years until the State of Ohio, the plaintiff in the original action, was unable to defend by the refuting statement of an esteemed trial judge has the direct effect of denying the State of Ohio due process of law. And it is material to ask, where have these individuals been for the last ten years who are now claiming that Judge Blythin made such statements to them, if what they now say is the truth?

The District Court made no examination of the trial record to support his finding that the trial judge was biased and prejudiced, and the only proper and competent proof to determine this issue is the record of the trial which speaks for itself. Nor is there any showing in the trial record that the trial judge, in fact, did anything but properly carry out his duties as a presiding judge in this case in safeguarding and protecting the rights of this petitioner to a fair trial by a jury. Judge Blythin was not the trier of the facts. Issues of fact on the trial were determined by a jury, not by the judge, and we cannot see that the cases of *State ex rel. Pratt v. Weygandt*, 164 O. S. 463 (1956), *Tumey v. Ohio*, 273 U. S. 510 (1927), and *In re*

Murchison, 349 U. S. 133 (1955) cited by the District Court have any application to the instant case. Further, no one of these cases lends support to the proposition that the qualifications of a state trial judge can be passed upon by a Federal District Judge on habeas corpus. The *Murchison* case, *supra*, was decided by the Supreme Court of the United States on appeal. And the *Tumey* case, *supra*, was also decided on appeal. The *Pratt* case was an action in mandamus originating in the Supreme Court of Ohio.

Article IV, Section 3 of the Constitution of Ohio, provides in part:

> "Any judge of the Court of Common Pleas may temporarily preside and hold court in any county; and until the General Assembly shall make adequate provision therefor, the Chief Justice of the Supreme Court of the state shall pass upon the disqualification or disability of any judge of the Court of Common Pleas, and he may assign any judge to any county to hold court therein."

There is nothing in *Fay v. Noia*, 372 U. S. 391, upon which decision the District Court relies, giving a federal district court on habeas corpus, jurisdiction to circumvent a state constitutional provision.

Section 2701.03 of the Revised Code of Ohio reads:

> "When a judge of the Court of Common Pleas is interested in a cause or matter pending before the court, is related to, or has a bias or prejudice either for or against a party to such matter or cause or to his counsel, or is otherwise disqualified to sit in such cause or matter, on the filing of an affidavit by any party to such cause or matter, or by the counsel of any party, setting forth the fact of such interest, bias, prejudice, or disqualification, the clerk of the Court of Common Pleas shall enter the fact of such filing on the trial docket in such cause and forthwith notify the chief

justice of the supreme court. The chief justice shall designate and assign some other judge to take the place of the judge against whom such affidavit is filed. The judge so assigned shall try such matter or cause. Such affidavit shall be filed not less than three days prior to the time set for the hearing in such matter or cause."

This state legislation requires the timely filing of an affidavit of bias and prejudice and both the state constitutional provision and state statute require that the question of bias and prejudice be determined by the Chief Justice of the Supreme Court. No affidavit of bias and prejudice was filed in the instant case in the state court.

It is stated in 30A *American Jurisprudence,* Sec. 172, p. 89:

"A judge is not disqualified to sit in a criminal case merely because he has an opinion as to the guilt of the accused, or is convinced of his guilt, * * *"

Furthermore, even though the trial judge may have expressed an opinion as to the guilt of the petitioner to strangers to the case, there is no showing or any proof that the trial judge conveyed any such personal opinion to the jury, who were the triers of the facts. The trial judge did not render the judgment on the facts.

If the Honorable Judge Edward Blythin were alive to defend on this issue, he no doubt would reiterate what he stated so succinctly on the motion for new trial:

"It is to be noted that not a single person or agency connected with the investigation of, or prosecution for, the crime involved escapes the anathema of the defense. These include the police, the coroner, his assistants, the prosecuting attorney and his aides, the State's witnesses, the grand jury, its foreman, the trial jury, the public, the bailiffs *and the court.* The sense of search for truth and the declaration of justice

seems to have vanished from a whole community as if by magic and overnight. The news agencies of every kind and character are thrown in for good measure. In spite of all the charges made not a single specific item is cited in support of the claims made. Only broad generalities are indulged in. Reviewing courts will, we hope, have the duty of passing on all the legal questions involved and appearing on the record, and unless it is shown in very clear fashion that some extrinsic forces plowed through the effort to grant the defendant a fair trial, and succeeded in disrupting that effort, it is fair to assume that none did." (Emphasis ours.) (Appendix, Vol. I, pp. 46a-47a.)

Further, there is no basis in the record for any finding that the trial judge did not discharge his duties conscientiously, carefully, and with dignity and due regard for the constitutional rights of the petitioner to a fair trial.

The Court of Appeals said:

"We believe that the District Judge was under a misapprehension in assuming that because Judge Blythin could not answer the charges against him, such charges constituted 'uncontroverted evidence' that Judge Blythin had made the statements attributed to him. There are many circumstances in which testimony need not be accepted even though formally uncontradicted. *E.g., Quock Ting v. United States,* 140 U. S. 417, 420-22, 35 L. Ed. 501, 502-03 (1891); *Scates v. Isthmian Lines, Inc.,* 319 F (2) 798, 799 (CA 9, 1963); *Ramos v. Matson Nav. Co.,* 316 F (2) 128, 132 (CA 9, 1963); *D'Orsay Equip. Co. v. United States Rubber Co.,* 302 F (2) 777, 779-80 (CA 1, 1962); *Powers v. Continental Cas. Co.,* 301 F (2) 386, 388-89 (CA 8, 1962); *Wooley v. Great Atl. & Pac. Tea Co.,* 281 F (2) 78, 80 (CA 3, 1960); *Hasson v. C. I. R.,* 239 F (2) 778, 782 (CA 6, 1956); *Andrew Jergens Co. v. C. I. R.,* 125 F (2) 686, 689 (CA 6, 1942); *Goodyear Tire & Rubber Co. v. FTC,* 101 F (2) 620, 624 (CA 6, 1939), *cert. denied,* 308

U. S. 557, 84 L. Ed. 468 (1939); 8 Cyclopedia of Fed. Proc. § 26.98 (3d ed. 1951); 11 Id. § 47.161 (3d ed. 1963); 7 Wigmore, *Evidence,* § 2034, pp. 260-63 (3d ed. 1940). Manifold reasons for rejecting the 'uncontroverted' statements adduced by petitioner exist in the present case. Whether offered to prove the matter asserted or merely the fact of assertion, testimony as to the uncorroborated oral statement of a deceased person is the weakest form of evidence, viewed with suspicion and subject to close scrutiny. 'The courts consider with suspicion, or lend a reluctant ear to, statements as to what a deceased person may have said, especially when corroboration is lacking.' 31A C. J. S. *Evidence,* § 266, p. 689. Such statements 'are regarded as of comparatively little probative value. * * *' 20 Am. Jur. *Evidence,* § 1196, p. 1048, and '* * * courts of justice lend a very unwilling ear to statements of what dead men had said,' *Lea v. Polk County Copper Co.,* 62 U. S. (21 How.) 493, 504, 16 L. Ed. 203, 207 (1859). * * *" (Pet. App. A, pp. s.35-s.36.)

The Court of Appeals said further:

"The only authorities cited by the District Judge for his finding of constitutional error in the failure of the trial judge to recuse ~~recuse~~ himself, *State, ex rel. Pratt v. Weygandt, Chief Justice,* 164 Ohio St. 463, 132 NE (2) 191 (1956); *Tumey v. Ohio,* 273 U. S. 510, 71 L. Ed. 749 (1927); *In re Murchison,* 349 U. S. 133, 99 L. Ed. 942 (1955), are completely inapposite. In the case at bar it was the jury and not the judge who determined the guilt or innocence of petitioner. *Pratt v. Weygandt* was a divorce case to be decided entirely by the trial judge, and mandamus to compel his replacement was refused. *McFadden v. United States,* 63 F (2) 111 (CA 7, 1933), not cited by the court below, is also distinguishable as involving a trial to the judge without a jury. Similarly, in *Tumey v. Ohio,* the United States Supreme Court held improper state provisions for trial of liquor law violations be-

fore a village mayor who was to retain the amount of his costs in each case of conviction, in addition to his salary. The Court said, 'But no fees or costs in such cases are paid him except *by the defendant if convicted.* There is, therefore, no way by which the mayor may be paid for his service as judge, *if he does not convict* those who are brought before him * * *.' 273 U. S. 520, 71 L. Ed. 753. (Emphasis supplied.) The Court also noted that 'all questions of judicial qualification may not involve constitutional validity. Thus matters of * * * personal bias * * * seem generally to be matters merely of legislative discretion.' 273 U. S. 523, 71 L. Ed. 754. *In re Murchison* involved the Michigan 'one-man grand jury' statute and the Supreme Court held that due process was denied where the judge presiding at a contempt hearing had also served as the 'one-man grand jury' out of whose proceedings the contempt charges arose. The distinction between these cases and the case at bar is obvious." (App. A, pp. s.39-s-40.)

III.

LIE DETECTOR EVIDENCE.

It is not a fact, as stated by present counsel (Pet. p. 32) that defense counsel "cited specifically" the publicity given petitioner's refusal to take a polygraph test when he sought a change of venue and/or a continuance. And, publicity concerning the lie detector occurred months before the trial.

The petitioner did not allege as error in the state courts, the admission of testimony concerning his unwillingness to take a lie detector test, but did complain about this testimony in the former petition for a writ of certiorari filed with this Court in 1956.

The District Court finds that it has jurisdiction to consider this alleged error even though it was not urged

on appeal to the Ohio Courts (Appendix, Vol. III, pp. 464a-465a); and finds further that the trial judge had the duty of instructing the jury that no inference could be drawn from petitioner's refusal to submit to such a test, and by failing to do so, he violated petitioner's constitutional rights. (Appendix, Vol. III, p. 468a.) The court quotes from *Fay v. Noia* as authority for taking jurisdiction on this issue although it was not raised in the state courts.

Failure to obtain review in the state courts on this issue was not because any appellate remedies were withheld by the state courts as in *Noia, supra,* and all that *Noia* stands for is that failure to timely appeal from a state conviction did not bar federal habeas corpus relief under exceptional circumstances. For the Supreme Court said in *Noia,* 372 U. S. 391, at pages 428-429:

> "It is a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the co-presence of federal grounds. See, e.g. NAACP v. Alabama, 357 U. S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 1163; Fox Film Corp. v. Muller, 296 U. S. 207, 80 L. Ed. 158, 56 S. Ct. 183. Section 25 of the Judiciary Act of 1789, c 20, 1 Stat. 85-87, denied this Court power to base the reversal of a state court decision on any error other 'than such as * * * immediately respects * * * questions of validity or construction of the said (Federal) constitution, treaties, statutes, commissions, or authorities in dispute.' The deletion of the express restriction by the Judiciary Act of February 5, 1867, c 28, Sec. 2, 14 Stat. 386-387, did not enlarge this Court's power in that regard. * * *"

The Supreme Court stated also in *Noia,* 372 U. S. 391, at p. 441:

> "Noia's case stands on its own. * * *"

We contend that by this piecemeal consideration of an issue that could have been raised in the state courts, the District Court encroached upon the state appellate court's prerogative to search the record and determine whether the admission of this testimony and the instruction of the trial court was error, and if error there was, whether it was prejudicial.

In *Townsend v. Sain* (1963), 372 U. S. 293, 317, 9 L. Ed. 2d 770, 788, 83 Sup. Ct. 745, the court, in reliance upon the *Noia* case, held:

> "The standard of inexcusable default set down in Fay v. Noia adequately protects the legitimate state interest in orderly criminal procedure, *for it does not sanction needless piecemeal presentation of constitutional claims in the form of deliberate by-passing of state procedures.*" (Emphasis ours.)

This case was remanded to the District Court and on appeal, the 7th Circuit reversed in *U. S. ex rel. Townsend v. Ogilvie, Sheriff*, 334 F. (2d) 837 (1964). The 7th Circuit held (pp. 843-44):

> "* * * we conclude a federal court has exhausted its statutory power in a habeas corpus proceeding after it has decided a confession, introduced in a state criminal trial, was voluntarily given. *The court does not possess a residuum of power to search the record for procedural errors not involving constitutional rights and issue a writ of habeas corpus for the purpose of providing a new trial in the state court.*
>
> "A federal court acting in this fashion would constitute a super appellate tribunal and *encroach upon state appellate court prerogatives;* such action would affront the principles of federalism upon which our federal-state juridic system operates." (Emphasis ours.)

And the cases cited by the District Court in the instant case, namely, *Frye v. United States*, 293 F. 1013 (D. C. Cir. 1923), *Ohio v. Smith*, 113 O. App. 461 (1960), and *New Jersey v. Driver*, 183 A. 2d 655 (1962) are decisions in which appellate courts were exercising their appellate court prerogatives in determining whether there was prejudicial reversible error in the admission or exclusion of evidence pertaining to the lie detector.

As stated in *Wolf v. Nash*, 313 F. 2d 393 (C. A. Mo.) (8th Cir.) (1963), certiorari denied, 83 S. Court 1713, 374 U. S. 817, 10 L. Ed. 2d 1041, the due process clause of the 14th Amendment does not enable a federal court to review errors of state law.

Furthermore, there is no foundation in the record for the raising of any claim that the petitioner's constitutional rights were violated in the admission of conversations between the petitioner and the officers concerning the lie detector. The defense went into the matter also on the trial, on this issue. How was the petitioner denied due process of law under the circumstances?

The trial court instructed the jury that a person is not compelled to take a lie detector test (R. 3852). The trial court had nothing before it upon which to instruct the jury further concerning the lie detector. In relating his first conversation with the petitioner about taking a lie detector test, Officer Schottke testified on direct examination:

> "He was then asked if he would take a lie detector test and he said 'yes.' He asked how a lie detector worked and we told him that it takes the reaction of the respiratory system.
>
> * * * He said that due to his present condition, that he didn't feel as though this would be a fair test

and that he would not want to take the test at this particular time.

We told him that he would be able to take the test, if he wanted to, at the time when he felt better." (R. 3590-3591.)

No objection was made to this testimony.

On cross-examination of Officer Schottke, defense counsel questioned him as follows regarding a later conversation he had with the petitioner:

"Q. Now, during that conversation you asked him about the lie detector again, didn't you?

A. I don't recall at this particular time whether I did or not.

Q. Well, to try and refresh your memory, did you say to him, 'Doctor, are you still willing to take a lie detector test?'

A. I don't recall at this time, sir.

Q. And did he say to you that, 'I am willing, but not one that will be conducted by the Cleveland Police Department, because you have already accused me'?

Did he answer you that way?

A. I don't recall.

Q. And did he add that, 'If you can find somebody that is competent in a community far removed from the city of Cleveland,' that he would be willing to accompany you and take the test that you requested of him?

A. I don't recall that conversation.

Q. You don't recall that. But you wouldn't say to this Court and jury, under the oath that you have accepted to tell the truth, that that conversation didn't take place, would you, Officer Schottke?

A. I don't recall at this time the conversation that you state." (R. 3727-3728.)

And on re-cross-examination, Officer Schottke was again questioned concerning the petitioner's willingness to take a lie detector test. (R. 3743.)

At Record 3846, Deputy Sheriff Rossbach related his conversation with the petitioner about taking a lie detector test. No objection was made to this testimony. It was not until later on, during Rossbach's testimony, that the defense, for the first time, objected to testimony concerning the lie detector (R. 3851) which was followed by the court's instruction to the jury that no one is compelled to take a lie detector test.

Despite the above objection, Dr. Sheppard when testifying in his own behalf on direct examination by his counsel, told about the first request that he submit to a lie detector test and stated that he told the officers he would be willing to submit to such examination "if it was a reliable test."

Further, in their argument to the jury, the defense stated:

> "And then during the course of that conversation he says, 'Are you willing to take a lie detector test,' and what was the answer that this man gave, he says, 'I am.'" (R. 5376-5377.)

The petitioner, of course, had not submitted to any lie detector test, but in view of what the record shows, where is there any support for holding that the admission of this testimony constituted prejudicial reversible error, or that the petitioner was denied due process of law on this issue. The trial court in instructing the jury that no one is compelled to take a lie detector test was merely applying a rule of evidence. This raises no federal question. As stated in *Buchalter v. People of State of New York*, 319 U. S. 427, 431, 63 S. Ct. 1129, 1131, 87 L. Ed. 1492:

> "The due process clause of the 14th Amendment does not enable us to review errors of state law however material under that law. See also Lisenba v. People of State of California, 314 U. S. 219, 226-229, 62 S. Ct. 280, 86 L. Ed. 166."

The District Court finds that Mayor Houk's testimony concerning the taking of a lie detector test permitted the jury to infer that he had passed the test and that Houk was not on trial. (Appendix, Vol. III, p. 469a.)

Houk was merely a witness in this case, not the defendant. The petitioner's brother, Dr. Steve Sheppard, had filed charges with the police against Mayor Houk, and Houk's willingness to take the lie detector test was simply one item of fact to show both his attitude and conduct. It certainly does not raise any constitutional issue for the petitioner because Mayor Houk took a lie detector test, nor could it be consistently claimed that the petitioner was denied due process of law because Mayor Houk was willing to take a lie detector test.

In the instant case, the State court by its instruction to the jury concerning the lie detector was merely interpreting state law. There is no adequate federal basis for the finding of the district court on this issue. The mere suggestion that the petitioner submit himself to certain tests did not deny him due process of law. He did not take any tests nor was he compelled to do so.

The Court of Appeals stated:

> "* * * We cannot find that the handling of this matter deprived the petitioner of any federally granted constitutional rights. If there was fault in what occurred, it was a nonconstitutional error which should have been assigned on appeal. Habeas corpus is not to be employed as a substitute for appeal. *E.g., Oyler v. Taylor,* 338 F (2) 260, 262 & n. 3 (CA 10, 1964); *Allen v. Bannan,* 332 F (2) 399, 402 (CA 6, 1964); *Barker v. Ohio,* 328 F (2) 582, 584-85 (CA 6, 1964); *Worth v. Michigan,* 291 F (2) 621, 622 (CA 6, 1961), *cert. denied,* 368 U. S. 862 (1961); *Anderson v. Jones,* 281 F (2) 684, 686 (CA 6, 1960).

"We think that the observations of the Seventh Circuit in *United States ex rel. Townsend v. Ogilvie*, 334 F (2) 837, 843-44 (1964) are pertinent here.

> 'The (federal) court does not possess a residuum of power to search the record for procedural errors not involving constitutional rights and issue a writ of habeas corpus for the purpose of providing a new trial in the state court.
>
> 'A federal court acting in this fashion would constitute a super appellate tribunal and encroach upon state appellate court prerogatives; such action would affront the principles of federalism upon which our federal-state juridic system operates.'

"At this distance, we cannot say that the decision of Dr. Sheppard's veteran counsel to withhold objection to the lie detector evidence prejudiced their client. It goes without saying that Dr. Sheppard's conviction does not prove such.

"As proud as we are of the great traditions of our courts and their concern for the rights of those accused of crime, we are aware that like all human institutions they seldom act with perfection. It is not difficult, after ten years of searching analysis and contemplative study and the announcement of some new judicial attitudes, to find some imperfections in the conduct of a trial and to conclude that a judge or any attorney could have done a better job. But stability of the law and a nation's respect for its courts will disappear if, long after the event, their judgment may be set aside because a trial judge's discretion was less than perfectly exercised or because it is thought that the trial plan of defense counsel was not the best that could have been employed. This must be especially true where an accused has enjoyed adequate and full opportunities for appellate review." (Pet. App. A, pp. s.48-s.49.)

IV.

MISCONDUCT OF BAILIFFS IN ALLOWING JURORS TO CALL THEIR FAMILIES.

This issue was before this Court on the previous petition for a writ of certiorari.

We wish to point out, at the outset, that the matters complained of took place in the hotel room when some of the jurors called their husbands or children on the telephone, and not in the jury room during the deliberations. The jurors deliberated in a room above the court room in the Criminal Courts Building and there is absolutely no evidence in the record showing any misconduct of the jury or of the officers in charge.

The telephone calls to the husbands and children of the jurors, all made in the presence of the bailiff, were not made during the deliberations of the jury. They were made from the hotel room to which they had been taken from the jury room and there is no evidence whatsoever that the case was even discussed in these telephone calls, much less anything said prejudicial to the petitioner.

There is no evidence whatsoever of telephone conversations with strangers. The testimony of Bailiff Edgar Francis follows:

> "Q. Do you know, of your own knowledge, whether there were any telephone communications made out of any of the respective rooms that were occupied by any members of the jury?
>
> A. Their phones were cut out, Mr. Garmone.
>
> Q. By whose request?
>
> A. Mr. Steenstra arranged that.
>
> Q. And were there any telephone calls made from the room that you occupied?
>
> A. Yes, sir.
>
> Q. Did you make the calls, or did the jury make the calls?

A. No. The jury made the calls, and I sat in the chair right alongside the telephone.

* * *

Q. Mr. Bailiff, what was the purpose of the calls that the jurors made in your presence?

* * *

A. Well, they were made to their husbands and wives, and those that had children, they talked to the children.

Q. Was there any conversation whatsoever about this case or their deliberations?

A. Not one word, Mr. Parrino." (R. 7084-7085.)

The defense saw fit to call certain jurors to the witness stand on their motion for new trial and if they wished to pursue this matter further, they had the right and opportunity so to do. They chose not to do so and there is nothing in the record whatever of anything having been said or done either by the bailiffs or by or to the jurors prejudicial to the petitioner.

The trial court stated when a supplemental motion for new trial was filed:

"The court named Simon Steenstra, permanent criminal jury bailiff and Edgar Francis his own courtroom bailiff as the persons to have charge of the jury in their movements during the period of deliberation. They were named in open court in the presence of all interested parties. Both were well known to all parties, with the possible exception of defendant, and not a word of objection was voiced by anyone. Furthermore, one of counsel for the defense saw the court in chambers prior to the selection of said bailiffs and inquired of the court who he intended to appoint to take charge of the jury during the deliberation period. Upon being informed that the court would name Bailiffs Steenstra and Francis he expressed his wholehearted approval." (Appendix, Vol. I, p. 47a.)

The Supreme Court of Ohio in the opinion states:

"Defendant contends that he was prejudiced in this case by the actions of two officers of the court, in whose charge the jury was committed during its deliberations, in permitting some members of the jury to make unmonitored telephone calls in violation of Section 2945.33, Revised Code, which reads as follows:

'When a cause is finally submitted the jurors must be kept together in a convenient place under the charge of an officer until they agree upon a verdict, or are discharged by the court. The court may permit the jurors to separate during the adjournment of court overnight, under proper cautions, or under supervision of an officer. Such officer shall not permit a communication to be made to them, nor make any himself except to ask if they have agreed upon a verdict, unless he does so by order of the court * * *.'

"It is conceded that no authorization for such telephone calls was given by the court.

"At the conclusion of each day's deliberation, the members of this jury were housed in the Carter Hotel, under the supervision of two court bailiffs. The record reveals that the telephones in the hotel rooms occupied by individual jurors had been 'cut out.' However, some of them were permitted to make calls on the telephone in the room of one of the bailiffs.

"In connection with a motion for a new trial, the record discloses the following cross-examination of one of the bailiffs by counsel for defendant:

'Q. Did you make the calls, or did the jury make the calls?

A. No. The jury made the calls, and I sat in the chair right alongside the telephone.'

"On redirect examination, the testimony was as follows:

"On redirect examination, the testimony was as follows:

'Q. Mr. Bailiff, what was the purpose of the calls that the jurors made in your presence?

* * *

A. Well, they were made to their husbands and wives, and those that had children, they talked to the children.

Q. Was there any conversation whatsoever about this case or their deliberations?

A. Not one word, Mr. Parrino.'

"Counsel for defendant rely upon State v. Adams, 141 Ohio St. 423, 48 N. E. (2d) 861, 146 A. L. R. 509, as authority for their contention that the action of the bailiff in permitting these telephone calls constituted error prejudicial to the defendant. They cite the third paragraph of the syllabus of that case, which reads:

'The violation by a court officer in charge of a jury of Section 13448-1, General Code (Section 2945.33, Revised Code), to the effect that he shall not communicate with a jury in his charge or custody except to inquire whether it has reached a verdict, will be presumed to be prejudicial to a defendant against whom, after such communication, a verdict is returned by such jury.'

"A mere reading of the following fourth paragraph of the syllabus of the Adams case should be sufficient to distinguish that case from the present one:

'Where a court bailiff, on being informed by the jury during its deliberations that it could not agree, stated to it: 'You can't do that. You must reach a decision if you have to stay here for three months,' there is a violation of the statute which is prejudicial to a defendant against whom, following such declaration, a verdict is returned by the jury.'

"The case of Emmert v. State, 127 Ohio St. 235, 187 N. E. 862, 90 A. L. R. 242, although not cited by defendant, might also be authority for the proposition that misconduct of a bailiff is ground for reversal. That case, however, is also readily distinguishable

from the present one. In the Emmert case the officer in charge of the jury, at a time when it was not actually in its deliberative sessions, said to certain members of the jury: 'My God, you are all wet. Judge Stahl expects you to return a verdict of guilty and if you don't it will be just too bad.' Other remarks of a similar nature to the effect that the jury had to reach a verdict were made by the bailiff.

"In situations such as those in the Adams and Emmert cases, it is easy to presume prejudice to the defendant as a result of the conduct of the bailiff. Can the same be said of the conduct of the bailiffs here in permitting jurors, who for several days and nights had been sequestered and unable to see or hear from their husbands, wives or children, to telephone those members of their families? We do not think so. There is, on the contrary, every reason to believe that assurances of the health and welfare of their loved ones would tend to ease the jurors' minds as to personal matters and would make them better, more conscientious jurors. Time after time, the members of this jury were instructed by the court not to communicate with anyone concerning this case or permit anyone to communicate with them about it. We must assume they followed the court's instructions. No complaint is made that they disregarded these instructions every night for some seven weeks that they were allowed to go home at the close of each day's session of the trial. It is difficult to visualize a juror who will follow a court's instruction during the many hours he spends each evening and week end with his family and then deliberately disregard that instruction in a few brief moments he speaks to a member of his family on the telephone in the presence of a bailiff.

"The law in Ohio is that no judgment of conviction shall be reversed in any court for any cause unless it appears affirmatively from the record that the defendant was prejudiced thereby or was prevented from having a fair trial. Section 2945.83, Revised Code.

> There is no such affirmative showing of prejudice here, and this Court will not presume a prejudice as a matter of law from the fact that some of the jurors made telephone calls to members of their immediate families." (Appendix, Vol. I, pp. 111a-113a.)

The District Court says that the Supreme Court of Ohio should have granted a new trial because of the unequivocal language of Section 2945.33, *supra*, and cites *Mattox v. United States*, 146 U. S. 140 (1892). But in the *Mattox* case, which was heard on appeal, communications with the jury were shown to be harmful. A newspaper account of the case was introduced into the jury room during deliberations, bearing upon the merits of the case. The record in the instant case, however, affirmatively shows that the telephone calls made by the jurors to members of their immediate families were harmless. The District Court's conclusion that they were harmful to the petitioner is again based upon a suspicion that the jurors were not to be trusted in following the instructions of the court not to discuss the case with anyone.

Further, we cannot see where a Federal District Court has any jurisdiction on habeas corpus to interpret a state statute such as Section 2945.33, or determine how that law should be applied by the state courts in the light of the facts in a particular case. The Supreme Court said in *Townsend v. Sain*, 372 U. S. 293, 311-12 (1963):

> "The whole history of the writ * * * refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review."

The Supreme Court of Ohio in interpreting Section 2945.33, *supra*, in the light of the facts in the instant case, was exercising appellate jurisdiction over state legislation. The District Court has attempted to place its own interpre-

tation on this legislation and in so doing, has acted as a super appellate tribunal over the state court on this matter. Under Section 2945.83, *supra*, it must affirmatively appear from the record that these telephone calls were harmful. There is no proof and none was offered on the motion for new trial, that the calls were anything but harmless.

The Court of Appeals stated:

"* * * Here again the District Judge placed reliance on cases the facts of which disclose their lack of resemblance to the case before him and us. *State v. Adams*, 141 Ohio St. 423, 48 NE (2) 861, 146 ALR 509 (1943); *Emmert v. State*, 127 Ohio St. 235, 187 NE 862, 90 ALR 242 (1933); and *Mattox v. United States*, 146 U. S. 140, 36 L. Ed. 917 (1892). In *State v. Adams*, a bailiff who had been told by the jury that it could not agree said to them, 'you can't do that. You must reach a decision if you have to stay here for three months.' In *Emmert v. State*, the officer in charge of the jury remarked to certain jurors, 'My God, you are all wet. Judge Stahl expects you to return a verdict of guilty and if you don't it will be just too bad.' Aside from this obvious inappositeness, these Ohio cases were found not controlling of this case by the Ohio Court. *Mattox v. United States* involved direct review of a federal trial. Because the dissenting opinion frequently cites *Mattox* to support its conclusions, we have set out in the margin Chief Justice Fuller's recital of the facts in *Mattox* because it discloses a situation totally different from the facts of the present case * * *." (Pet. Appendix A, pp. s.52-s.54.)

The Court of Appeals continued:

"* * * The showing that communications were had with the jurors, accordingly, is not of itself enough to demonstrate a denial of due process. So in *Near v. Cunningham*, 313 F. (2) 929, 933 (CA 4, 1963), the court ruled that 'should it appear that prejudicial

statements were made in the presence or hearing of the jurors,' the habeas corpus court must reach its constitutional decision 'in the light of all of the surrounding circumstances.' Here there is no pretense at showing that prejudicial statements were made to the jurors by their children or spouses. The presumption that the jurors remained true to their instructions is fortified by petitioner's neglect of his opportunity to show that the jurors chose this particular opportunity among many to violate their instructions. In view of the absence of any attempt to demonstrate or even claim such violations here, we are satisfied that the Ohio Supreme Court correctly disposed of this issue, and that in any event the occurrence does not present a denial of constitutional due process." (Pet. Appendix A, pp. s.55-s.56.)

V.

OTHER ALLEGED CONSTITUTIONAL VIOLATIONS.

The claims under this heading in the petitioner's brief are unsupported by any findings by the District Court.

A. It is, of course, not a fact that the petitioner was arraigned without counsel on a capital charge. The argument pertains to the arrest of the petitioner on a warrant and present counsel is evidently not familiar with what transpired when the petitioner was arrested.

The petitioner was arrested on July 30th, brought before the Acting Mayor of Bay Village and the case was set for preliminary hearing on August 9, 1954. Petitioner's counsel filed an affidavit of bias and prejudice on August 7, 1954 to prevent the Acting Mayor from proceeding with any hearing. This affidavit of bias and prejudice was sustained by Judge Frank J. Merrick of the Court of Common Pleas of Cuyahoga County, on August 13, 1954 and Judge Merrick transferred the case to Judge William K. Thomas

of the Court of Common Pleas. Judge Merrick ordered the Acting Mayor to forthwith deliver to Judge Thomas all files and papers in the case for further proceedings according to law. Judge Thomas, subsequently, released the petitioner on bail. Judge Merrick's opinion appears in 121 N. E. (2d) 440, *State v. Sheppard*. The proceeding had on this affidavit of bias and prejudice is recorded in Special Docket No. 67061 of the records of the Court of Common Pleas of Cuyahoga County.

B. It is claimed that defense counsel on the trial were denied the right to exercise a peremptory challenge, after Juror Manning was excused and his place taken by alternate Juror Hanson. This same claim was made in the previous petition for a writ of certiorari filed in 1956. A faulty legal stipulation was entered into in the District Court regarding peremptory challenges. The Court of Appeals of Cuyahoga County stated:

> "The defendant entered his exception to the procedure used by the Court in discharging Juror Manning and demanded the right to exercise his remaining peremptory challenge when the first alternate juror was seated in the panel after Manning was discharged, which request was refused.
>
> "After a jury is sworn and charged with the delivery of the defendant, the trial is commenced and unused peremptory challenges cannot thereafter be used and where an alternate juror has been selected and sworn as provided by law, he must be seated in the place of the discharged juror by order of the Court."

Revised Code Section 2313.37 provides in part:

> "If before the final submission of the case to the jury a juror becomes incapacitated or disqualified, he may be discharged by the judge, in which case, or if a juror dies, upon the order of the judge, said additional or alternate juror shall become one of the jury and

serve in all respects as though selected as an original juror."

In any event, there is here no federal question.

C. The petition makes reference to matters concerning the possession of the home of the petitioner and it is argued that a Dr. Paul Leland Kirk discovered a large blood spot in the murder room that did not come from the petitioner; that if the jury had had this evidence, they would have acquitted.

The claim that the authorities seized the home of the petitioner was made in the previous petition for a writ of certiorari filed in 1956. This was made an issue by the defense on the motion for new trial on the ground of newly discovered evidence, which motion was denied by the trial court, affirmed by the Court of Appeals of Cuyahoga County in 100 Ohio Appeals 399 and dismissed on appeal by the Supreme Court of Ohio in 164 O. S. 428. No appeal was taken from the final action of the Supreme Court of Ohio.

This is just another example of the one-sided proceeding that was conducted in the District Court. The affidavit of Dr. Kirk was part and parcel of a Bill of Exceptions covering the motion for new trial on the ground of newly discovered evidence, and is but a fragmentary excerpt from that record. That Bill of Exceptions also went on file with the District Court and contains counter-affidavits that would have to be considered along with Dr. Kirk's affidavit, as well as on the unfounded claim that the defense were prevented from examining the premises. The Court of Appeals of Cuyahoga County has completely answered this claim in 100 Ohio Appeals at pages 406-407:

"During the trial the defendant subpoenaed the keys into court through Chief Eaton and demanded the right to retain them. The trial judge, however, ruled

that they must remain in the possession of the police of Bay Village, which order was carried out until December 23, 1954, when complete possession of the house was given the defendant. *There is no evidence that any request to enter the house for the purpose of investigation and inspection was ever made by the defendant, nor does the record show any formal application to the court at any time for a like purpose.* Dr. A. J. Kazlauckas, a physician and expert who had spent many years as a deputy coroner of Cuyahoga County, was in the employ of the defendant. He examined all the articles of property pertaining to this case in the possession of the county coroner, together with the autopsy report, conclusions of laboratory findings and X-rays of Marilyn Sheppard, and yet made no effort to make any scientific examination of the premises. He was not even presented as a witness during the trial. Assistant Prosecuting Attorney Saul S. Danaceau deposes in his affidavit that he informed Arthur E. Petersilge, of counsel for the defendant, and the brother of the defendant, Dr. Stephen Sheppard, in early November, 'that the said house was available to the defendant at any and all times to inspect or conduct investigations therein.' It seems, however, that it was understood that on all occasions a police officer would have to accompany the defendant or any representative of his when visiting the home."

The record of this case shows the extreme importance of numerous articles of property within the home and a number of such articles appear as exhibits in the evidence. It was also necessary to continue the examination of the premises for blood spots, fingerprints, etc., by the scientific unit of the Cleveland Police Department. It was also necessary to continue the examination and search in and about the house for possible clues and particularly for the still missing T-shirt and weapon. The whole episode in

the closing days of the trial, and the demand for the keys to the home in the presence of the jury, was a grandstand play and show, and nothing else.

In the meantime, the petitioner and his counsel had, on more than one occasion, visited the home, went through all the rooms and examined the house, both inside and outside.

D. This is just another example of the numerous frivolous claims made by the defense, and this claim that the Ohio Supreme Court was illegally constituted when the court heard this case, was presented to this Court in the former petition for a writ of certiorari.

It was at the instance of the defense, and without informing the prosecution of their intention, that the Chief Justice disqualified himself and appointed another judge. No objection was made prior to the hearing on this case in the Supreme Court of Ohio and it was not until after the court as constituted made its decision adverse to the defense, that they first raised the issue.

This is purely a State constitutional question. Article IV, Section 2 of the Ohio Constitution, in its pertinent parts provides as follows:

> "* * * If any of said Judges shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the Chief Justice, or in case of the absence or disability of the Chief Justice, the Judge having the longest period of service upon that Court, may direct any Judge of any Court of Appeals to sit with the Judges of the Supreme Court in the place and stead of the absent judge."

Under that constitutional provision, only in the case of absence or disability of the Chief Justice (not mere disqualification) is the judge having the longest period of

service upon the Supreme Court authorized to direct an appellate judge to sit. Where the Chief Justice merely disqualifies himself and is not absent or disabled, it is the Chief Justice who directs the appellate judge to sit with the judges of the Supreme Court.

A reading of the opinion of the Supreme Court of Ohio will show that there was no failure of review in this case, as claimed.

VI.

SUFFICIENCY OF THE EVIDENCE.

This claim of the petitioner that the evidence on the trial was insufficient, was considered by the Court of Appeals, and the Court said:

> "One further subject should be briefly mentioned. Dr. Sheppard's petition claimed that the evidence at his trial was constitutionally insufficient to justify submitting the issue of guilt or innocence to the jury. This claim was neither withdrawn nor sustained upon the hearing in the District Court. On this subject, the petitioner's brief states,
>
> 'The District Judge expressly declined to consider this issue * * *, although in all fairness it should be stated that counsel for petitioner-appellee on several occasions offered to waive this claim of error. * * * No waiver was required, however, *and the issue remains.* This Court no doubt has the power, since the trial transcript is before it as an exhibit from the District Court to search the record and conclude that the allegation of insufficiency is well-taken.' (Emphasis supplied.)
>
> "We construe this as a suggestion that we pass upon this point only if we find in his favor. Counsel continues as follows:
>
> 'Appellee neither asks nor urges such relief, for he is ready, willing and anxious to stand retrial in any

community not infected with an envenomed atmosphere, and a favorable ruling upon this issue would cause jeopardy to attach to the 1954 trial. This is not, however, to be taken as any concession that there was sufficient evidence to constitutionally support a judgment of conviction in the first instance, for we vigorously contend that there was not. We simply do not press it at this time.'

"The Court of Appeals decision, affirmed by the Ohio Supreme Court, fully discussed the evidence and found it sufficient for submitting the issue of guilt to the jury. 100 Ohio App. 345. No claim is made here that that court's detailed recital of the evidence adduced at the trial is substantially erroneous. Without attempting to assess petitioner's actual guilt or innocence, this recital clearly establishes that Dr. Sheppard's conviction is not 'so totally devoid of evidentiary support' as to constitute a denial of due process. *Garner v. Louisiana,* 368 U. S. 157, 163 (1961); *Thompson v. City of Louisville,* 362 U. S. 199 (1960); *Hall v. Crouse,* 339 F. (2) 316 (CA 10, 1964).

"Petitioner apparently desires to save something for a further entry into or a rehearing in the District Court. We think that Ohio's appeal has brought the entire habeas corpus proceeding to us. We have passed upon it and do not find any basis for the release of Dr. Sheppard or the granting of a new trial." (Pet. Appendix A, pp. s.57-s.58.)

VII.

THE AGGREGATION OF ERROR.

Counsel for the petitioner alleges under this heading that "the record we challenge is fairly riddled with error of every kind." And, "If no single incident in these entire proceedings was sufficient to vitiate the conviction, certainly the aggregate is more than sufficient." (Pet., p. 42.) Counsel claims further that the jury was tainted, the

judge was biased, the prosecutor was unfair, the evidence was unfair and the reviewing courts of Ohio dodged and strained to pull together the shreds of a shabby conviction (Pet., p. 42). In spite of all of these charges, not a single specific item is cited in his argument throughout his brief, in support of the claims made. Only broad generalities are indulged in, as well as faulty assumptions.

On this issue, the Court of Appeals said:

> "Each of the 'errors' discussed above was found by the District Judge to constitute a deprivation of due process, but he concluded his opinion with the observation that when taken together they reduced the trial to a 'mockery of justice.' Without further discussion, we are unable to attribute to a combination of these several claims a constitutional potency they lack individually. We have rejected the claims based on publicity, alleged bias of the trial judge, and communications with the jurors because no showing has been made that anything improper in fact occurred; we are no more willing to presume infirmity when these claims and the matter of the lie detector evidence are listed together than when they are considered separately." (Appendix A, p. s.56.)

CONCLUSION.

Throughout petitioner's brief, counsel cites a recent decision of this Court, *Estes v. Texas,* 14 L. Ed. (2d) 543 (1965). There is no similarity in the judicial proceedings in that case with the conduct of the trial in the Sheppard case. Moreover, it was said by Justice Clark in delivering the opinion of the court in the *Estes* case (pp. 549-550):

> "It is true that the public has the right to be informed as to what occurs in its courts, but reporters of all media, including television, are always present if they wish to be and are plainly free to report whatever occurs in open court through their respective

media. This was settled in Bridges v. California, 314 U. S. 252, 86 L. Ed. 192, 62 S. Ct. 190, 159 A. L. R. 1346 (1941), and Pennekamp v. Florida, 328 U. S. 331, 90 L. Ed. 1295, 66 S. Ct. 1029 (1946), which we reaffirm."

A complete and fair analysis of the record discloses no foundation in fact for the claims advanced for the third time in this Court, for the allowance of a writ of certiorari. And, we are not citing a denial of certiorari in some other case as a precedent. This Court denied certiorari in this case and denied a rehearing.

It should be noted also that present counsel for the petitioner uses the same exhibits in the Appendix to support the present petition that were presented to and considered by this Court in the former petition.

That there was a tremendous amount of interest in this case, not only throughout our own community, but throughout the state and nation, and in other parts of the world, is not in dispute. It does not follow, however, from the mere fact that this murder mystery fascinated so many people, that the petitioner was prevented from having a fair trial or that any of the petitioner's constitutional rights were violated.

The Court of Appeals appropriately said:

"More fundamentally, we are struck by the difficulty some ten years after the trial of indulging in the proposed speculation that had it been held in some other county in Ohio, the interest of the press, the radio and T. V. would have subsided, or that the citizens of some rural county would be less interested in the colorful events involved than their brothers in the big city. Was the interest in the long ago Scopes trial less because it was held in a rural area of Tennessee? Had the trial judge here decided to postpone the trial a month, six months, or a year, would not fresh

and more colorful cries of righteous indignation be heard from all of today's media of information? Whither in time or place should a court run to attempt to seat a jury completely disinfected of all news, and at the same time intelligent? Compare *Rees v. Peyton*, 341 F. (2) 859, 863 (CA 4, 1965); *United States v. Cohn*, 230 F. Supp. 589, 590-91 (S. D. N. Y. 1964). Should a Federal Judge now speculate whether change of scene or postponement might have offered a way to administer some judicial catharsis to cleanse away all that prospective jurors might have seen, read, or heard about a matter of such interest as the killing of Mrs. Sheppard? We do not think that such speculative review of the trial judge's discretion should now be indulged in the context of this case." (Pet. App. A, p. s.33.)

Further, the opinions of newspaper editors and newspaper articles should not be received as a substitute for evidence, nor as a substitute for the well-reasoned opinions of the trial and reviewing courts based upon the record.

On the record there is no substantial Federal question involved herein and the present petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 490

SAMUEL H. SHEPPARD,

Petitioner,

vs.

E. L. MAXWELL, Warden,

Respondent.

MOTION FOR LEAVE TO FILE AND BRIEF OF AMICI CURIAE, AMERICAN CIVIL LIBERTIES UNION AND OHIO CIVIL LIBERTIES UNION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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In the Supreme Court of the United States

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SAMUEL H. SHEPPARD,

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MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND OHIO CIVIL LIBERTIES UNION, AMICI CURIAE.

The American Civil Liberties Union and its Ohio affiliate, the Ohio Civil Liberties Union, respectfully move for leave to file a brief *amicus curiae* in support of the petition for writ of certiorari in this case. Counsel for petitioner has consented to this filing; respondent's attorney has denied consent.

For many years, the American Civil Liberties Union and its affiliates have fought to defend and extend the First Amendment guarantees of freedom of speech and press, upon the clear principle that a free society cannot exist unless the persons within its boundaries are permitted—rather, encouraged—to express themselves by word and in print without fear of governmental restraint. And we are aware of the mighty role that a free press plays in helping to establish and preserve that free society. This Court has amply demonstrated its own dedication to these principles.[1]

[1] See *Bridges v. California*, 314 U. S. 252 (1941); *Craig v. Harney*, 331 U. S. 367 (1947); *Pennekamp v. Florida*, 328 U. S. 331 (1946); *Wood v. Georgia*, 370 U. S. 375 (1962).

But it is equally clear that freedom without justice is an empty virtue. "The safety of society and the security of the innocent alike depend upon wise and impartial criminal justice. Misuse of its machinery may undermine the safety of the State; its misuse may deprive the individual of all that makes a free man's life dear." [2] It has been observed that "not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community." [3]

The point at which free press and fair trial intersect in the administration of criminal justice—the notorious criminal trial amidst inflammatory publicity in an aroused community—presents serious and complex problems to those who would defend both the principles of freedom and justice. As the quantum and the techniques of the communications media continue to expand, as the public thirst for the contemporaneous details of notorious criminal trials continues unslaked, the quality of criminal justice in the courts of our land will be subjected to ever-increasing stresses unless this Court provides detailed working principles to guide the trial courts of the states (as well as the federal courts which it directly supervises) in the administration of this most difficult task.

In recent years, this question has been thrust forcibly and dramatically before the attention of the American public.[4]

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[2] *Pennekamp v. Florida*, 328 U. S. 331, 357 (1946) (concurring opinion).

[3] *Irvin v. Dowd*, 366 U. S. 717, 729 (1961) (concurring opinion).

[4] *Report of The President's Commission on the Assassination of President John F. Kennedy* (1964), pp. 231-242. "The experience in Dallas * * * is a dramatic affirmation of the need for steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial." P. 242.

This Court, on a case by case basis, has already begun the task of weighing the delicate due process considerations involved when a notorious criminal trial takes place in a community inflamed by massive prejudicial publicity.[5]

The case at bar provides the Court with yet a further opportunity to analyze and refine working constitutional principles to guide the trial courts through this most sensitive area of criminal due process. For, through the auspices of the Great Writ,[6] a number of varieties of prejudicial trial and pretrial publicity have been preserved for review by this Court.

In the firm belief that this case presents a clear opportunity for this Court to further delineate the federal constitutional standards of criminal due process as they relate to inflammatory publicity surrounding notorious trials, and in the hope that in some measure they may be of assistance to the Court in performing its delicate task of assuring that "the conclusions to be rendered in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print" [7] while "refusing to sacrifice freedom of press to the whims of judges," [8] this application is filed.

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[5] *Marshall v. United States*, 360 U. S. 310 (1959); *Janko v. United States*, 366 U. S. 716 (1961); *Irvin v. Dowd*, 366 U. S. 717 (1961); *Rideau v. Louisiana*, 373 U. S. 723 (1963); *Estes v. Texas*, 381 U. S. 532 (1965). Cf. *Shepherd v. Florida*, 341 U. S. 50 (1951) (concurring opinion); *Stroble v. California*, 343 U. S. 181 (1952).

[6] *Fay v. Noia*, 372 U. S. 391 (1963); *Townsend v. Sain*, 372 U. S. 293 (1963). "Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. * * * Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment; if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." *Fay v. Noia*, 372 U. S. 391 (1963).

[7] *Patterson v. Colorado*, 205 U. S. 454, 462 (1907).

[8] Douglas, J., *The Public Trial and the Free Press*, 33 Rocky Mt. L. Rev. 1 (1960).

Because we consider it to be highly important to the advancement of these objectives that this Court consider this case on its merits, movants seek to participate at this preliminary stage of these proceedings by filing the attached brief *amicus* in support of the petition for certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 490.

SAMUEL H. SHEPPARD,
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vs.

E. L. MAXWELL, Warden,
Respondent.

BRIEF OF AMICI CURIAE.

STATEMENT OF THE CASE.

On December 21, 1954, petitioner, Samuel H. Sheppard, was convicted of murder in the second degree for the slaying of his wife after a sensational jury trial which captivated the attention of the nation.

Marilyn Sheppard, petitioner's pregnant young wife, had been bludgeoned to death in the bedroom of her lakeshore home during the early morning hours of July 4, 1954. Petitioner told police and testified in court that he had been wakened from his sleep on a couch in the downstairs living room by a noise or cry from upstairs, ascended the stairs, and was knocked unconscious while grappling with an unidentifiable white form standing next to his wife's bed. He further stated that upon recovering, he pursued the form out of the house, to be again knocked out while struggling on the shore. Petitioner has consistently denied guilt from the date of the murder until and including the present time. He at first denied, but later

admitted having had sexual relations with a former employee of the hospital upon whose staff petitioner served as a doctor of osteopathic surgery. The prosecution contended that this affair was the motive for premeditated murder, although the jury verdict did not support a finding of premeditation.

Petitioner was arrested for murder on July 30, 1954; he was admitted to bail and indicted a few days later, on August 17, 1954. He remained in custody thereafter until his trial. The nine-week trial began on October 18, 1954; the jury began its deliberations on December 17, 1954 and five days later a verdict of guilty of murder in the second degree was returned. Petitioner was thereafter sentenced to life imprisonment in the Ohio Penitentiary.

The news coverage of the murder, the pretrial investigation and the subsequent trial was massive, detailed, pervasive, inflammatory, colorful and "not of a nature calculated to inspire confidence in the objectivity and good taste of the public news media." [9] The trial and pretrial publicity which permeated the atmosphere in which petitioner stood trial for murder was succinctly described by the Ohio Supreme Court in reviewing his conviction:

> "Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the pre-indictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. Special seating facilities for reporters and columnists representing local papers and all major news services were installed in the

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[9] S. 23, majority opinion, Sixth Circuit Court of Appeals. The prefix "S" refers throughout to the page of the appendix attached to the petition for certiorari.

courtroom. Special rooms in the Criminal Courts Building were equipped for broadcasters and telecasters. In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life." 165 Ohio St. 293, 294, 135 N. E. 2d 340, 342 (1956).

An adequate summary of the barrage of publicity which inundated the community before and during petitioner's murder trial is beyond the scope of this statement of facts.[10] For purposes of this Court's review of the petition for certiorari, however, the damaging trial and pretrial publicity may be categorized as follows:

1. Publicity relating to the strength of the state's case or the guilt of the accused, procured or cooperated in by state law enforcement authorities.[11]
2. Publicity relating to testimony of witnesses not offered at trial by the prosecution.[12]
3. Publicity relating to evidence which would have been inadmissible if offered at trial.[13]
4. Publicity which made celebrities of the trial jurors.[14]
5. Publicity charging guilt or attacking the character of the accused.[15]

Because of the inflammatory atmosphere generated by the adverse publicity, defense counsel moved for a continuance,

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[10] Examples of some of the newspaper clippings, photographs and editorials which appeared in Cleveland journals are appended to the petition for certiorari. All of these materials which appeared in Cleveland newspapers between the dates of the murder and petitioner's conviction are collected in bulk in five green scrapbooks certified to this Court by the Court of Appeals. Additional examples are discussed in the argument, *infra*.

[11] E.g., S. 110, S. 125, S. 126, S. 127.

[12] E.g., S. 109, S. 110, S. 126, S. 127.

[13] E.g., S. 119, S. 120.

[14] E.g., S. 103, S. 105, S. 106, S. 107, S. 108, S. 128.

[15] E.g., S. 115, S. 116, S. 117, S. 118, S. 119, S. 120, S. 121, S. 122, S. 123, S. 124, S. 125, S. 126, S. 129.

change of venue and mistrial both before and repeatedly during the trial. All such motions were denied by the trial court.

During the course of the jury empanelling, 13 of the 64 prospective jurors examined were dismissed for cause because they had prejudged the guilt or innocence of the accused.

While the jurors who were ultimately empanelled were sworn to impartiality, eleven of the twelve who returned the verdict admitted exposure to the pretrial publicity, one had paid particular attention to each detail of the case offered by the news media, the better to discharge his duties as a juror, and the twelfth juror, although asserting that, during the period of more than three months between the murder and the commencement of the trial, she had heard nothing about the case, admitted receiving the Cleveland Press daily at her home.

The trial court did not sequester the jury; consequently, all of the jurors were permitted to return to their homes when court was not in session during the nine-week trial.

Since his conviction and the denial of his motion for new trial, petitioner's attempt to obtain a new trial has been the subject of sustained litigation for the past eleven years. Both his conviction and the denial of his motion for new trial were affirmed by the Court of Appeals for Cuyahoga County, Ohio.[16] The Ohio Supreme Court dismissed an appeal from the decision affirming the denial of a new trial,[17] and affirmed the conviction,[18] two judges dissenting.

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[16] *State v. Sheppard*, 100 Ohio App. 345, 128 N. E. 2d 471 (1955); *State v. Sheppard*, 100 Ohio App. 399, 128 N. E. 2d 504 (1955).

[17] *State v. Sheppard*, 164 Ohio St. 428, 131 N. E. 2d 837 (1956).

[18] *State v. Sheppard*, 165 Ohio St. 293, 135 N. E. 2d 340 (1956).

Application for certiorari was denied by this Court[19] and his application for rehearing was also denied.[20] Petitioner's subsequent petition for a writ of habeas corpus to the Ohio Supreme Court was denied.[21]

On April 11, 1963, petitioner filed an application for a writ of habeas corpus in the United States District Court of the Southern District of Ohio, charging that his conviction was constitutionally defective in a number of respects, including a denial of due process of law resulting from the adverse newspaper publicity before and during his trial. On July 15, 1964, the District judge concluded, upon examining the trial and pretrial publicity and other matters, that petitioner did not have a fair trial and that his conviction was, therefore, inconsistent with the United States Constitution, ordered his release on bail from the Ohio Penitentiary where he had been confined under a life sentence since his conviction in 1954, and granted the State of Ohio sixty days within which to take further action against petitioner.[22]

Respondent appealed the order of the United States District Court which voided the state court conviction. On May 5, 1965, the Sixth Circuit Court of Appeals (two

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[19] *Sheppard v. Ohio,* 352 U. S. 910 (1956). Justice Frankfurter's memorandum opinion concurring in the denial of certiorari, however, was careful to point out that "[s]uch denial of his petition *in no wise implies that this Court approves the decision of the Supreme Court of Ohio* [denying petitioner's claim that the publicity surrounding his trial deprived him of due process of law]. It means and means only that for one reason or another this case did not commend itself to at least four members of the Court as falling within those considerations which should lead this Court to exercise its discretion in reviewing a lower court's decision." (Emphasis and bracketed material supplied.) 352 U. S. 910, 911 (1956).

[20] *Sheppard v. Ohio,* 352 U. S. 955 (1956).

[21] *State ex rel. Sheppard v. Alvis,* 170 Ohio St. 551, 167 N. E. 2d 94 (1960).

[22] *Sheppard v. Maxwell,* 231 F. Supp. 37 (S. D. Ohio 1964).

judges for the majority and one dissenting) reversed the judgment of the District Court and remanded petitioner to the custody of respondent.[23] Thereafter, a petition for rehearing was denied and on July 26, 1965, the Court of Appeals stayed the mandate pending application for certiorari to this Court. The petitioner remains at large on bail.

QUESTIONS PRESENTED.

I.

In a notorious capital prosecution in a state court, where an aroused community was inundated with inflammatory publicity asserting the strength of the state's case and the guilt of the defendant, where much of this information was transmitted to the public before and during the trial by the news media with the cooperation of, or by the procurement of state law enforcement authorities, and where defense motions for change of venue, continuance and mistrial were overruled by the trial court, is a conviction thereby obtained a denial of due process of law within the meaning of the Sixth and Fourteenth Amendments to the United States Constitution, even in the absence of direct proof in the record demonstrating actual prejudice to the defendant?

II.

In a notorious capital prosecution in a state court, where an aroused community was inundated with inflammatory publicity asserting the strength of the state's case and guilt of the defendant, where a part of such publicity related to the damaging testimony of prosecution witnesses

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[23] The opinion of the Court of Appeals is reported at 33 U. S. L. Week 2588 (May 5, 1965) and is reproduced in the appendix to the petition for certiorari at 3. 1.

transmitted to the public by the news media before and during the trial, although the prosecution never produced such witnesses at the trial, and where defense motions for change of venue, continuance and mistrial were overruled by the trial court, is a conviction thereby obtained a denial of due process of law within the meaning of the Sixth and Fourteenth Amendments to the United States Constitution, even in the absence of direct proof in the record demonstrating actual prejudice to the defendant?

III.

In a notorious capital prosecution in a state court, where an aroused community was inundated with inflammatory publicity asserting the strength of the state's case and the guilt of the defendant, when a part of such publicity relating to damaging evidence which, if offered at the trial, would have been inadmissible in evidence, was transmitted to the public by the news media before and during the trial, and where defense motions for change of venue, continuance and mistrial were overruled by the trial court, is a conviction thereby obtained a denial of due process of law within the meaning of the Sixth and Fourteenth Amendments to the United States Constitution, even in the absence of direct proof in the record demonstrating actual prejudice to the defendant?

IV.

In a notorious capital prosecution in a state court, where the identities, addresses, families and personalities of the trial jurors were transmitted to the public by the news media during the trial in such a manner as to make celebrities of such trial jurors in the aroused community in which the trial was held, is a conviction thereby obtained a denial of due process of law within the meaning of the

Sixth and Fourteenth Amendments to the United States Constitution, even in the absence of direct proof in the record demonstrating actual prejudice to the defendant?

V.

In a notorious capital prosecution in a state court, where an aroused community was inundated with inflammatory and accusatory publicity asserting the guilt of the defendant, where damaging episodes attacking the defendant's character were transmitted to the public by the news media before and during his trial, and where defense motions for continuance, change of venue and mistrial were overruled by the trial court, is a conviction thereby obtained a denial of due process of law within the meaning of the Sixth and Fourteenth Amendments to the United States Constitution, even in the absence of direct proof in the record demonstrating actual prejudice to the defendant?

REASONS FOR GRANTING THE WRIT.

Although this Court has scrupulously guarded the right of the independent press to publish out-of-court news and editorial comment about pending judicial proceedings virtually without governmental restraint[24] within the past half-dozen years[25] it has become increasingly aware of, and shown a willingness to deal with, the consequences to fair trial[26] of such untrammelled use of freedom of expression, both in federal[27] and state[28] criminal prosecutions.

A critical issue in each of these cases has been the kind and quantity of evidence in the record sufficient to show

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[24] *Bridges v. California*, 314 U. S. 252 (1941), established that press freedom was entitled to "the broadest scope that could be countenanced in an orderly society," subject only to the requirement of the clear and present danger standard, defined as "a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." See also *Craig v. Harney*, 331 U. S. 367 (1947); *Pennekamp v. Florida*, 328 U. S. 331 (1946); *Wood v. Georgia*, 370 U. S. 375 (1962).

[25] But five years after the petitioner's trial and three years after the denial of certiorari on his direct appeal.

[26] The source of the constitutional command upon state courts to provide fair trials for those accused of crime is, of course, the Due Process Clause of the Fourteenth Amendment, either standing alone or coupled with the Sixth Amendment. Whether the Sixth Amendment as a whole applies to the states through the Fourteenth, cf. *Adamson v. California*, 332 U. S. 46, 71-72 (1947) (dissenting opinion); *Griffin v. California*, 380 U. S. 609 (1965), or the Fourteenth Amendment includes the "fundamental" portions of the Sixth, *Gideon v. Wainwright*, 372 U. S. 335, 342 (1963) or incorporates a concept of "ordered liberty" distinct from the specific guarantees of the Bill of Rights, see *Pointer v. Texas*, 380 U. S. 400, 408 (1965) (concurring opinion), state prosecutions must meet the constitutional guarantee of fair trial. *Cox v. Louisiana*, 379 U. S. 559, 562 (1965); *Jackson v. Denno*, 378 U. S. 368, 377 (1964).

[27] *Marshall v. United States*, 360 U. S. 310 (1959); *Janko v. United States*, 366 U. S. 716 (1961).

[28] *Irvin v. Dowd*, 366 U. S. 717 (1961); *Rideau v. Louisiana*, 373 U. S. 723 (1963); *Estes v. Texas*, 381 U. S. 532 (1965). Cf. *Shepherd v. Florida*, 341 U. S. 50 (1951) (concurring opinion); *Stroble v. California*, 343 U. S. 181 (1952).

prejudice to the defendant requiring reversal. That this issue should be of prime concern in this area is not a surprising matter, both because prejudice resulting from publicity "may be so subtle that it escapes the ordinary methods of proof," [29] and because of the normal reluctance of a juror to concede his bias before his peers.[30]

In its earliest consideration of cases in this area beginning with *Stroble v. California*, this Court apparently required a showing of actual prejudice to the defendant before reversing a conviction on the ground that inflammatory publicity had contaminated the trial.[31] In subsequent cases, however, "the Court departed from the approach it charted in *Stroble v. California*" [32] and reversals were accomplished without such a showing upon the ground that prejudice was inherent in the trial and pretrial publicity.[33]

This latter approach to the protection of due process of law has a long and honorable history in this Court.

In *Tumey v. Ohio*, 273 U. S. 510, 532 (1927), Chief Justice Taft said:

> "Every procedure which would offer a *possible* temptation to the average man * * * to forget the burden of proof required to convict * * * or which might lead him not to hold the balance nice, clear and true

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[29] *Estes v. Texas*, 381 U. S. 532, 578 (1965) (concurring opinion).

[30] E.g., *Irvin v. Dowd*, 366 U. S. 717, 728 (1961): "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father."

[31] *Stroble v. California*, 343 U. S. 181 (1952); *Irvin v. Dowd*, 366 U. S. 717 (1961).

[32] *Estes v. Texas*, 381 U. S. 532, 543 (1965).

[33] *Rideau v. Louisiana*, 373 U. S. 723 (1963); *Estes v. Texas*, 381 U. S. 532 (1965). *Accord*: *Turner v. Louisiana*, 379 U. S. 466 (1965); *Gideon v. Wainwright*, 372 U. S. 335 (1963); *White v. Maryland*, 373 U. S. 59 (1963).

between the State and the accused, denies the latter due process of law." (Emphasis supplied.)[34]

In *In re Murchison*, 349 U. S. 133, 136 (1955), Mr. Justice Black, speaking for the Court, said:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. *But our system of law has always endeavored to prevent even the probability of unfairness.* * * * [T]o perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U. S. 11, 14." (Emphasis supplied.)[35]

The application of the principle that actual prejudice need not be shown where the circumstances are inherently suspect constitutionally is particularly appropriate in cases involving publicity-poisoned trials. For where such trial contamination is charged, "one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced." [36]

In cases involving both published confessions [37] and damaging accusatory publicity,[38] this Court has reversed convictions because of the inherently unconstitutional circumstances and not upon a showing of actual prejudice.

The instant case turned upon these considerations in the court below. Although there has never been any material disagreement about the extent or nature of the damaging publicity which inundated the community in which petitioner stood trial for murder, either in the opinions affirming his conviction on direct appeal or those in the

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[34] Quoted with approval in *Estes v. Texas*, 381 U. S. 532, 543 (1965).

[35] *Ibid.*

[36] *Id.* at 544.

[37] *Rideau v. Louisiana*, 373 U. S. 723 (1963).

[38] *Estes v. Texas*, 381 U. S. 532 (1965).

collateral proceeding presently before this Court, the majority of the Court of Appeals reversed the finding of the District Court that the newspaper publicity was inherently prejudicial. They held instead that the burden upon the petitioner of demonstrating the constitutional invalidity of his conviction was "one which must be carried 'not as a matter of speculation but as a demonstrable reality'," upon the authority of *inter alia, Stroble v. California,* 343 U. S. 181 (1952),[39] and that petitioner had not met that burden.

In seeking the grant of the writ of certiorari to review, and reverse the decision of the Court of Appeals, *amici* do not claim that all criminal trials conducted in the context of massive publicity are, without proof of actual prejudice, violative of the constitutional command that each accused is entitled to a fair trial by an impartial judge and jury.

Rather, *amici* urge this Court to continue in the direction it has begun in *Rideau* and *Estes* and grant certiorari in order to rule that certain specific types and varieties of pretrial and trial publicity,[40] all present in quantity and intensity in the case at bar, are inherently prejudicial to the accused, because they necessarily deny him a fair trial by both judge and jury.[41]

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[39] S. 8. This ruling was made despite the implications of *Rideau v. Louisiana,* 373 U. S. 723 (1963) and persisted upon application for rehearing after *Estes v. Texas* had made it clear that this Court had departed from the *Stroble* approach. 381 U. S. 532 (1965). S. 111-113.

[40] Because the jury was not sequestered in the instant case, but had the opportunity to view and hear the publicity disseminated during trial, both pretrial and trial publicity will be considered together.

[41] Throughout this brief it is presumed that the evil in inflammatory and oppressive news reporting and comment about a highly-publicized crime and trial affects the impartiality of the *judge* as well as the *jury.* For "[T]o deny that bludgeoning or poisonous comment has power to influence or at least to disturb,

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These varieties of publicity include:

I. Damaging publicity procured or cooperated in by state law enforcement authorities.

II. Damaging publicity relating to prospective testimony of prosecution witnesses not actually offered at the trial by the prosecution.

III. Damaging publicity describing evidence which, if offered by the prosecution at trial, would have been inadmissible and constitutionally prejudicial.

IV. Publicity which makes well-known personalities of the trial jurors.

V. Damaging publicity of an accusatory nature, whether or not participated in by law enforcement authorities, which charges guilt or attacks the character or reputation of the accused.

Each of these matters will be considered in sequence below.[42]

(Continued from preceding page)

the task of judging is to play make believe and to assume that men in gowns are angels. The psychological aspects of this problem become particularly pertinent in the case of elected judges with short tenure." *Pennekamp v. Florida,* 328 U. S. 331, 359 (1946) (concurring opinion). In the instant case, the fact that the trial judge stood for re-election in the middle of the trial, with the political support of the local newspaper which had crusaded vigorously to have petitioner arrested and convicted of murder, needs no further embellishment. See S. 101.

[42] There is no question here about the requisite "state action" to permit this Court to find a federal constitutional violation in each of the varieties of pretrial and trial publicity described above. In (I) the prosecution's active creation of the publicity demonstrates the necessary state action. *Mooney v. Holohan,* 294 U. S. 103 (1935). In (II), (III), (IV), and (V), it must be underscored that the constitutional impediment to a trial conducted in the milieu of such publicity lies not in the fact that the *independent press published the material in question,* but rather *because the trial court failed to protect the impartiality of the tribunal* by granting the continuances, change of venue or mistrial repeatedly sought by defense counsel.

The argument that such matters are within the sound dis-

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I.

DAMAGING PUBLICITY INDUCED BY LAW ENFORCEMENT AUTHORITIES.

There can be no question but that the police, the county prosecutor and other law enforcement officials were the cooperative sources, if not the procuring cause of much of the inflammatory publicity in the news media of which petitioner complains. Quotations from policemen concerning their opinions as to petitioner's guilt and lack of character,[43] publication of "mug shots" of petitioner which could only have come from official jail records,[44] and predictions of a "bombshell witness" (with a detailed description of his prospective direct testimony) to be produced at the trial by the prosecution[45] (but who ultimately never testified in court) are illustrative examples.

It seems clear enough that

> "To have the prosecutor himself feed the press with evidence that no self-restrained press ought to publish in anticipation of a trial is to make the State itself through the prosecutor, who wields its power, a conscious participant in trial by newspaper, instead of by those methods which centuries of experience have shown to be indispensable to the fair administration of justice." [46]

That such conduct on the part of law enforcement authorities is prevalent in most highly-publicized trials,

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cretion of the trial court is hopelessly irrelevant because the judge was required to make his discretionary rulings at a time when he was as subject to the prejudicial atmosphere created by the press as was the jury. See discussion in footnote 41, *supra*.

[43] E.g., S. 110, S. 126.

[44] E.g., S. 125.

[45] E.g., S. 127.

[46] *Stroble v. California*, 343 U. S. 181, 201 (1952) (dissenting opinion).

either to obtain a climate of community opinion in which conviction is likely or to accommodate the press because of weakness or the hope of political favor, cannot seriously be doubted.[47]

The need, so far as criminal due process is concerned, is compelling and urgent. It remains for this Court to announce a rule of conduct for law enforcement authorities which will make costly their participation in trial by newspaper. Reversal of convictions where unconstitutional conduct by law enforcement authorities pervaded the proceedings has been used effectively by this Court as a deterrent to such conduct.[48] A presumption of inherent unconstitutionality in a highly publicized trial where law enforcement authorities actively participated in the inflammatory press releases would assist materially in eliminating the practice of "anticipatory trial by newspapers"[49] which currently blots our administration of criminal justice.

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[47] E.g., *Stroble v. California*, 343 U. S. 181 (1952) (prosecutor released confession to press even before defendant had completed his statement); *Shepherd v. Florida*, 341 U. S. 50 (1951) (newspapers published confession of defendant and attributed information to sheriff; confession never offered at trial); *Irvin v. Dowd*, 366 U. S. 717 (1961) (prosecutor and police officials issued intensively publicized press releases stating that petitioner had confessed to six murders); *Rideau v. Louisiana*, 373 U. S. 723 (1963) (accused interviewed in jail by sheriff for television). And see official account of opinion-molding and toadying to news media pressure by Dallas law enforcement authorities in the *Report of The President's Commission on the Assassination of President John F. Kennedy (1964)*, pp. 231-242.

[48] E.g., *Mapp v. Ohio*, 367 U. S. 643 (1961) (evidence obtained by illegal search and seizure); *Beck v. Ohio*, 379 U. S. 89 (1964) (unlawful arrest); *Griffin v. California*, 380 U. S. 609 (1965) (comment by prosecutor on failure of defendant to testify); and see *Mooney v. Holohan*, 294 U. S. 103 (1935); *Alcorta v. Texas*, 355 U. S. 28 (1957); *Napue v. Illinois*, 360 U. S. 264 (1959); *Brady v. Maryland*, 373 U. S. 83 (1963).

[49] *Irvin v. Dowd*, 366 U. S. 717, 729 (1961) (concurring opinion).

II.

DAMAGING PUBLICITY DESCRIBING PROSECUTION EVIDENCE WHICH VARIES MATERIALLY FROM THAT INTRODUCED AT TRIAL BY THE PROSECUTION.

The record in the instant case is replete with prosecution evidence offered to the community by the news media but which never was offered in the actual trial. Charges by a police captain in command of the Cleveland police homicide bureau that petitioner was a "bare faced liar" in his sworn testimony[50] (although he never appeared as a rebuttal witness for the state at the trial), and newspaper revelation of the direct testimony of a prospective prosetion "bombshell witness" (who never testified in court)[51] are but two colorful examples.

This case bears witness to the wry comment of Mr. Justice Frankfurter, concurring in *Pennekamp v. Florida*, 328 U. S. 331, 362 (1946):

> "Cases are too often tried in newspapers before they are tried in court, and the cast of characters in the newspaper trial too often differs greatly from the real persons who appear at the trial in court and who may have to suffer its distorted consequences."

Quite apart from the question of the active participation of the police and prosecutor in the dissemination of such matter to the community at large,[52] the danger to due process of law caused by such publication is evident.

As Mr. Justice Jackson, concurring in *Shepherd v. Florida*, 341 U. S. 50, 52 (1951), has pointed out:

> "When such events take place in the courtroom, defendant's counsel can meet them with evidence, argu-

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[50] S. 110.

[51] S. 109.

[52] Discussed *supra*, pp. 18-19.

ments, and requests for instructions and can at least preserve his objections on the record.

"But neither counsel nor court can control the admission of evidence if unproven, and probably unprovable [evidence is] put before the jury by newspapers and radio. Rights of the defendant to be confronted by witnesses against him and to cross-examine them are thereby circumvented. * * *" (Bracketed material supplied.)

The prejudice to the defendant from such unoffered testimony in the news media is infinitely greater than if the same evidence were offered in court with appropriate due process safeguards. "[T]he propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied." [53]

Under such circumstances, a presumption of prejudice to the accused is as clearly justifiable as though the evidence were offered in court without affording the defendant the opportunity to object to its introduction, make a record for appeal, confront witnesses, cross-examine, or subpoena additional witnesses to rebut such evidence.

The violence to due process is patent.

III.

DAMAGING PUBLICITY DESCRIBING PROSECUTION EVIDENCE WHICH WOULD BE INADMISSIBLE IN COURT.

Closely allied to the prejudicial effect of prosecution witnesses whose direct testimony was communicated by the news media to the public, but who never appeared in court to subject themselves to cross-examination, is the dissemination of evidence which clearly cannot be offered

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[53] *Patterson v. Colorado*, 205 U. S. 454, 463 (1907).

in court because, by its very nature, it is prejudicially inadmissible.

Such material abounds in the case at bar. For example, the publication of petitioner's pretrial refusal to subject himself either to "lie detector" or "truth serum" tests by the police, coupled with the snide editorial suggestion that such suspicious conduct was indicative of his guilt[54] undoubtedly did incalculable damage to petitioner's credibility, which, it must be noted, was the principal question presented to the jury.

Whether or not the evidence would have been inadmissible in court because of the well-known unreliability of "lie detectors" and "truth serum," [55] or for the constitutional reasons that comment upon such refusal would invade (a) his Fifth Amendment privilege to refuse to testify against himself[56] or (b) his Sixth Amendment right to have his guilt or innocence determined by an impartial tribunal rather than by such "scientific" substitutes,[57] it is clear that the entire question was mooted by the pretrial publication of such prejudicial matters, before defense counsel had an opportunity to object to its introduction in court. The tactical dilemma in which petitioner's trial counsel found himself as a result of such prejudicial pretrial publicity is well illustrated by his compelled failure to object to the introduction of such damaging evidence in court—evidence which was well known to the entire community already and which he would only have re-empha-

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[54] S. 119, 120.

[55] *Ohio v. Smith*, 113 Ohio App. 461, 462-3 (Lucas 1960); *Parker v. Friendt*, 99 Ohio App. 329, 335-338 (Cuyahoga 1954); *Freeman v. New York Central R. R. Co.*, 15 Ohio Op. 2d 187, 190 (App. Lucas 1960) and see Annotation, 23 ALR 2d 1308 for collected cases.

[56] See *Griffin v. California*, 380 U. S. 609 (1965).

[57] *Ohio v. Smith*, 113 Ohio App. 461, 463 (Lucas 1960).

sized by objecting—and the subsequent determination by the Court of Appeals that the constitutional question had been waived by his conduct.[58]

It must be emphasized that the claim of constitutional infirmity made by *amici* here is not that the lie detector and truth serum testimony was admitted into evidence (a question which the Court of Appeals determined had been waived by the conduct of defense counsel), but rather, that the pretrial publication of such evidence was so inherently prejudicial that defense counsel's timely motions for continuance, change of venue, and later, mistrial, should have been granted by the trial court as a constitutional necessity.

IV.

PUBLICITY WHICH MAKES CELEBRITIES OF THE TRIAL JURORS.

There can be little doubt that the jurors who sat as the trier of fact in the instant case became well-known in the community in which the trial took place as a result of the spotlight of publicity focused upon them by their selection as talesmen. The court permitted them to be photographed by press photographers in the courtroom and the jury room, prominent display of the photographs, names and addresses of the jurors appeared frequently on the front pages of the press[59] and feature articles about them, their dress, their families and their deliberations appeared in the news media with sufficient frequency to remove the jurors from the obscurity they had known before their association with this case and add color to the community pageant which was petitioner's murder trial.[60]

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[58] S. 47.

[59] S. 103, 105.

[60] S. 106, 107, 108, 128.

Since the jury was not sequestered, it may be presumed that the jurors were aware of the treatment accorded them by the news media during the trial.

This Court has most recently had occasion to examine the psychological impact of intense publicity upon the jurors in *Estes v. Texas*.[61] While the issue presented there involved televising trial proceedings, many of the same considerations apply to the case at bar.

"Where pretrial publicity of all kinds has created intense public feeling which is aggravated by" intense publicity focused on the jury, "the nerve center of the fact-finding process," those jurors "cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them. If the community be hostile to an accused" a juror, "realizing that he must return to neighbors who saw" or read detailed accounts of "the trial themselves, may well be led 'not to hold the balance nice, clear and true between the State and the accused * * *'."

"Moreover, they would be subjected to the broadest commentary and criticism and perhaps the well-meant advice of friends, relatives and inquiring strangers who recognized them on the streets."[62]

If our jury system is to continue to have meaning, jurors must retain the anonymity which permits them to function best as representatives of their community in performing the delicate task of fact-finding. When this fragile balance has been upset by the communications media, the Sixth and Fourteenth Amendment guarantee of a fair trial by an impartial jury becomes meaningless.

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[61] 381 U. S. 532 (1965).

[62] *Id.* at 545-46.

V.

ACCUSATORY PUBLICITY WHICH CHARGES GUILT OR ATTACKS THE CHARACTER OR REPUTATION OF THE ACCUSED.

One fact jumps from the pages of the voluminous record in the case at bar with astonishing clarity. Seldom has such a zealous journalistic campaign been waged, first to arrest, and then to convict, an accused. Some of the varieties of trial by newspaper have already been chronicled above. Using only the language of the majority of the court below which found *no* constitutional infirmity in the trial and pretrial proceedings, the journalistic product has been alternately described as "shameful journalism," "certainly not conducive to the judiciary's continuing concern for the freedom that the press insists should at all times be accorded to it," [63] "violent and colorful language," [64] "not of a nature calculated to inspire confidence in the objectivity and good taste of the public news media," [65] "shabby reporting" [66] and "flamboyant and sometimes shabby pre-trial exhibitions of the press." [67]

It may well be that newspapers may be expected to perform no more nobly than they did in the early days of our country.[68] But the technological improvements in the communications media in the past two hundred years

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[63] S. 5.

[64] S. 14.

[65] S. 23.

[66] S. 23.

[67] S. 32.

[68] See letters of Thomas Jefferson as set out in Padover, Democracy, 150-151, reported in *Bridges v. California*, 314 U. S. 252, 270, f.n. 16 (1941): "I deplore * * * the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them. * * * These ordures are rapidly depraving the public taste."

make similar excesses exceedingly more dangerous to due process of law and the administration of criminal justice than did the limited technology of former times.

The fact which isolates the pretrial and trial publicity in the instant case from that in many other highly-publicized criminal trials, however, is the single-minded attempt by the news media to convict petitioner of the murder of his wife. By the use of slashing editorials,[69] biting cartoons,[70] maudlin feature stories[71] and slanted news articles,[72] both before and during the trial, petitioner was continually accused of the murder of his wife, lying to the police, inhibiting the criminal investigation, and using his social position and friends in high places to conceal his dirty work. During the trial, radio broadcaster Robert Considine stated on a network program that petitioner's denial of guilt reminded him of the denials of Alger Hiss when Hiss was convicted of perjury, and Walter Winchell, also on a network radio broadcast, proclaimed that a girl in New York then under arrest for armed robbery had revealed that petitioner was the father of her illegitimate child.

With due regard for the freedom of the press to depart from its proper function of reporting the news in a factual manner, and to engage, without governmental restraint, in the inflammatory and cheap journalism about whose literary quality all of the appellate judges who have reviewed this case agree, it must be observed that "freedom carries with it responsibility, even for the press; freedom

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[69] S. 115, S. 116, S. 117, S. 118, S. 119, S. 120, S. 121, S. 123, S. 124.

[70] S. 122, S. 129.

[71] S. 126.

[72] S. 125, S. 127.

of the press is not a freedom from responsibility for its exercise." [73]

Despite our nation's cultural and historic dedication to the First Amendment principle of freedom of expression, by word and in print, the news media must be reminded of the awful power which is theirs; they must come to understand that "a trial is not a 'free trade in ideas' nor is the best test of truth in a courtroom 'the power of the thought to get itself accepted in the competition of the market,'" [74] that "legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." [75]

This Court should hold that accusatory publicity which charges the defendant with guilt and attacks his character is inherently prejudicial, a denial of due process of law, and will require reversal of any subsequent conviction. Such a ruling would impress the news media, voluntarily and without judicial compulsion, to recognize their responsibilities toward the courts which protect their freedoms; further, it would serve as a warning to those who have a stake in preserving convictions obtained in the trial courts, that cynical use of the freedom of the press as a weapon to obtain a conviction will not be tolerated.

CONCLUSION.

Amici have urged the constitutional invalidity of the conviction of the petitioner because the trial court failed to protect the accused from the inherently prejudicial publicity which saturated the community in which he stood

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[73] *Pennekamp v. Florida*, 328 U. S. 331, 356 (1946) (concurring opinion).

[74] *Bridges v. California*, 314 U. S. 252, 283 (1941) (concurring opinion).

[75] *Id.*, at 271.

trial. For this reason, *amici* urge this Court to grant the writ of certiorari sought by petitioner so that his conviction may be reviewed and, ultimately, reversed. In doing so, this Court will have an opportunity to classify and provide working solutions for some of the difficult and delicate problems of free press and fair trial which currently beset the administration of criminal justice.

Respectfully submitted,

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FILE
JAN 1 3 1
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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 490

SAMUEL H. SHEPPARD,
PETITIONER,

v.

E. L. MAXWELL, WARDEN,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinion Below

The opinion of the Court of Appeals (Rs. 1-113) is reported at 346 F.2d 707.

Jurisdiction

The judgment of the Court of Appeals was entered May 5, 1965 (Rs. 1). A petition for a writ of certiorari was

filed in this Court on Aug. 24, 1965, and was granted Nov. 15, 1965. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

Questions Presented

1. Did the pre-trial publicity in petitioner's case so prejudice the community that no fair and impartial jury could have been impanelled?

2. Did the trial judge fail to adequately protect the petit-jury, once impanelled, from prejudicial extrinsic influence?

3. Did the trial judge fail to adequately interrogate the jurors when they had been exposed to prejudicial extrinsic matter through the news media during trial?

4. Did the trial judge fail to maintain constitutionally adequate decorum in the courtroom during trial?

5. Did the trial judge deny petitioner a public trial by assigning nearly all of the seats in the courtroom to newsmen?

6. Did the trial judge, in the special circumstances of this case, violate petitioner's constitutional right to a fair and impartial judge by failing to recuse himself despite his firm belief, undisclosed to petitioner, that petitioner was "guilty as hell" and that the case against him was "open and shut"?

7. Did the trial judge violate petitioner's federal constitutional right against self-incrimination by receiving evidence that petitioner had refused to take a lie detector test and truth serum?

8. Did the action of the bailiffs who permitted jurors to telephone outsiders during the course of deliberations in violation of Ohio law violate petitioner's federal constitutional right to a fair and impartial trial?

9. Did the court below deprive petitioner of proper review of other claimed federal constitutional violations?

10. Did the court below improperly foreclose without litigation the question of the sufficiency of the evidence?

11. Did the court below erroneously rule that no combination of individual errors, none of which rises to the stature of a federal constitutional violation, can in the aggregate show that the state court trial fell short of the requirements of due process of law?

Constitutional Provisions and Statutes Involved

Constitution of the United States

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall

private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Statutes

SECTION 2505.21, OHIO REVISED CODE. *Hearing on Appeal.*

"Appeals taken on questions of law shall be heard upon assignment of error filed in the cause or set out in the briefs of the appellant before hearing. Errors not argued by brief may be disregarded, but the court may consider

and decide errors which are not assigned or specified. Failure to file such briefs and assignments of error within the time prescribed by the court rules is cause for dismissal of such appeal. All errors assigned shall be passed upon by the court, and in every case where a judgment or order is reversed and remanded for a new trial or hearing, in its mandate to the court below, the reviewing court shall state the errors found in the record upon which the judgment of reversal is founded. * * * "

SECTION 2945.21, OHIO REVISED CODE. *Peremptory challenges in capital cases.*

"On the impaneling of a jury in a capital case, the state and the defendant, if there is only one defendant, may each peremptorily challenge six of the jurors, which challenges shall be exercised alternately. If there is more than one defendant, each defendant may peremptorily challenge six of the jurors, and the state may peremptorily challenge a number equal to the combined number allowed to all the defendants. Neither the state nor a defendant may be deprived of any of the challenges by reason of such order of exercising the same, or the time or manner of exercising the same."

SECTION 2945.29, OHIO REVISED CODE. *Jurors becoming unable to perform duties.*

"If, before the conclusion of the trial, a juror becomes sick, or for other reason is unable to perform his duty, the court may order him to be discharged. In that case, if alternate jurors have been selected, one of them shall be designated to take the place of the juror so discharged. If, after all alternate jurors have been made regular jurors, a juror becomes too incapacitated to perform his duty, and

has been discharged by the court, a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or thereafter impaneled."

SECTION 2945.32, OHIO REVISED CODE. *Oath to officers if jury sequestered.*

"When an order has been entered by the court of common pleas in any criminal cause, directing the jurors to be kept in charge of the officers of the court, the following oath shall be administered by the clerk of the court of common pleas to said officers: 'You do solemnly swear that you will, to the best of your ability, keep the persons sworn as jurors on this trial, from separating from each other; that you will not suffer any communications to be made to them, or any of them, orally or otherwise; that you will not communicate with them, or any of them, orally or otherwise, except by the order of this court, or to ask them if they have agreed on their verdict, until they shall be discharged, and that you will not, before they render their verdict communicate to any person the state of their deliberations or the verdict they have agreed upon, so help you God.' Any officer having taken such oath who willfully violates the same, or permits the same to be violated, is guilty of perjury and shall be imprisoned not less than one nor more than ten years."

SECTION 2945.33, OHIO REVISED CODE. *Keeping and conduct of jury after case submitted.*

"When a cause is finally submitted the jurors must be kept together in a convenient place under the charge of an officer until they agree upon a verdict, or are discharged by the court. The court may permit the jurors to separate during the adjournment of court overnight, under proper

cautions, or under supervision of an officer. Such officer shall not permit a communication to be made to them, nor make any himself except to ask if they have agreed upon a verdict, unless he does so by order of the court. Such officer shall not communicate to any person, before the verdict is delivered, any matter in relation to their deliberation. Upon the trial of any prosecution for misdemeanor, the court may permit the jury to separate during their deliberation, or upon adjournment of the court overnight."

Statement

In July 1954 Dr. Samuel H. Sheppard (petitioner herein) resided in Bay Village, a suburb of Cleveland, Ohio, on the south shore of Lake Erie. He was thirty years of age, and was a practicing osteopathic neurosurgeon. His two older brothers, Richard and Stephen, and his father, were also physicians and surgeons, and together the four Sheppards operated the Sheppard Clinic; in addition, all were on the staff of the Bay View Hospital in Bay Village.

On the evening of July 3, 1954, petitioner and his wife, Marilyn, also thirty years of age, were at home with their seven-year-old son. Visiting the Sheppards on that evening were friends named Don and Nancy Ahearn. The two couples conversed, listened to the radio and watched television; the evening was congenial, and there was no indication of hostility or discontent between Dr. and Mrs. Sheppard, who was pregnant at the time. At some point prior to midnight, Dr. Sheppard fell asleep on a couch in the downstairs living room. Marilyn Sheppard bade the Ahearns good-night at 12:30 a.m. on July 4, 1954; she was never seen alive again.

Shortly before six o'clock that same morning, J. Spen-

cer Houk, who was then Mayor of Bay Village and also a friend of the Sheppards, received a telephone call at his home, only two doors distant from that of Dr. Sheppard. Houk recognized the caller as petitioner, and heard him exclaim: "My God, Spen'—come quick! I think they've killed Marilyn!" Houk arose and dressed, as did his wife Esther; they drove their automobile the few hundred feet to the Sheppard home, and entered to find Dr. Sheppard on the floor. His face was bruised, and he complained of pain in his neck. Esther Houk went to Marilyn's bedroom on the second floor, and found Marilyn lying on her bed her head in a pool of blood. She was dead. She had been struck some thirty-five blows by a blunt instrument which has not to this day been ascertained. The time of her death was the subject of conflicting medical evidence at the trial.

No witness has ever appeared, other than petitioner, purporting to have knowledge of what occurred between the departure of the Ahearns and the arrival of the Houks. Petitioner's account of the intervening hours, as given to interrogators and subsequently as testimony, is substantially as follows.

At some time during the night Dr. Sheppard was awakened from his sleep on the downstairs couch by a noise coming from the second floor; he thought that he heard Marilyn call his name. Groggy from sleep, he ran up the stairs to his wife's bedroom, which was dimly lit by a light in the upstairs hall. He saw a "form" standing next to his wife's bed wearing some sort of white top; he could not distinguish whether the form was male or female. He attempted to attack or grapple with it, and was struck a blow on the back of the neck which caused him to lose consciousness. He had no way of estimating the time of this occurrence, except that it was dark.

He came to on the floor of the bedroom, and heard noises

on the floor below; he ran down the stairs, and chased a man through the screen door on the side of the house abutting Lake Erie. He pursued this person to the shore of the lake, wrestled with him, and was once more rendered unconscious. He regained consciousness on the sandy beach in front of his house, partly in the water. He ran to his wife's bedroom, checked her pulse and found none, then called Mayor Houk.

On the morning of July 4, 1954, petitioner's home was invaded by a swarm of investigators and police. Present were representatives of the Bay Village Police Department, the Cleveland Police Department, the Sheriff of Cuyahoga County, the County Prosecutor and the County Coroner. Interrogation of petitioner commenced in Bay View Hospital, to which he had been removed for treatment of shock, loosened teeth, facial bruises and a fractured cervical vertebra. It continued thereafter up to and beyond the day of his arrest on July 30, 1954. He was accused of having murdered his wife, which he flatly denied; he was asked to submit to a lie detector test, which he declined because of his physical condition after its operational principles had been explained to him.

The news media gave the "full treatment" to the entire incident, and during the first few days of the investigation many column inches and broadcast minutes were devoted to developments of and speculation upon the murder of Marilyn Sheppard. At this juncture, in the words of one who was at the time perhaps Cleveland's leader of the fourth estate, "The newspapers began to lose interest—except one." (Rs. 181)

This was, petitioner urges, the turning point in the Sheppard Murder Case. The Cleveland Press uncovered its "editorial artillery" (Rs. 188) and leveled it at Dr. Sheppard and the authorities who had failed to quickly wring a confession from him. In a series of system-

atically inflammatory and directive front-page banner-headed editorials (Rs. 115-127) that newspaper demanded and got (1) command of the investigation transferred to the Cleveland Police Department, (2) an extraordinary inquest, and (3) the arrest of Sam Sheppard. (Rs. 182-187)

Thereafter followed the indictment of petitioner (August 17, 1954) and his trial (October 18, 1954). Twenty-five days before trial there appeared in the Cleveland Press, the Cleveland Plain Dealer and the Cleveland News (since merged with the Press) the names of all 75 prospective jurors from which the petit jury was to be impanelled. (Ra. 298a)

At the trial, wherein petitioner was charged with the first-degree murder of his wife, the State of Ohio contended that petitioner's story was an incredible concoction, and that he had killed his wife because of an amatory interest in one Susan Hayes, a laboratory technician once employed at Bay View Hospital with whom petitioner admitted some intimacies a couple of months before his wife's death. Sheppard stuck to his story that some third person—or persons—had caused his wife's death, and he so testified. The jury retired to deliberate its verdict on December 17, 1954; on December 21, 1954, that jury returned a verdict of guilty of murder in the second degree.

Those additional facts germane to the issues argued in this brief will be set forth at the outset of each section of the argument to which they pertain.

Summary of Argument

I. Prejudicial Publicity.

(a) *Pretrial Publicity.* From the date of Marilyn Sheppard's murder on July 4, 1954, to the commencement of

the trial on October 18, 1954, the Cleveland community was saturated with publicity prejudicial to petitioner. All of the newspapers were critical of him, and whetted the public appetite for his conviction. Much that was never offered, and would have been inadmissible if offered, at trial, was published as fact by newspapers. The Cleveland Press instituted a calculated campaign for the purpose of having petitioner arrested, indicted, and convicted, which campaign was eminently successful. At its urging the county coroner called and held an inquest which was used to embarrass and ridicule petitioner, deprive him of his right to counsel, and sow more intensively the seeds of community hostility. The names of prospective jurors, with their addresses, were published in all Cleveland newspapers twenty-five days in advance of trial; this served, under the circumstances, to expose these jurors to highly prejudicial opinions and social pressures which tainted their impartiality. The District Judge correctly ruled that there could not have been assembled in Cleveland in 1954 a fair and impartial jury to hear and determine petitioner's case.

(b) *Publicity During Trial.* After denying petitioner's repeated motions for a continuance and a change of venue, the trial judge failed to sequester the jury. The news media continued the barrage of prejudicial publicity begun before trial, and the trial judge failed to adequately admonish the jurors to avoid exposure to this material. When specific news releases containing highly prejudicial and inadmissible fact and opinion, to which the jurors were exposed, were brought to his attention, the trial judge failed or refused to adequately investigate the possible effects of this extrinsic influence on the jury. The trial judge refused to grant a mistrial in several instances where such relief was warranted.

(c) *Disruption of the Trial by Newsmen.* The Supreme Court of Ohio correctly delineated petitioner's trial as a "Roman holiday" for the news media. The trial judge reserved almost the entire courtroom for newsmen, and admitted the general public only by special pass. There was in the course of the trial continual disruption and interference by newsmen, who showed no respect for the gravity of the proceedings they were to observe and report.

II. Bias of the Trial Judge.

Judge Edward Blythin, who presided at the Sheppard trial, had stated to two individuals before any evidence was presented that petitioner was "guilty as hell" and that his case was "open and shut." He was a candidate for reelection during the trial, and was subjected to laudatory publicity by the newspaper which most needed Dr. Sheppard's conviction, the Cleveland Press. He repeatedly made critical discretionary rulings in favor of the State. He allowed himself to be shown publicly exuding warm congratulations toward John J. Mahon, chief counsel for the State, who was also a successful candidate for the judiciary during trial.

III. Lie-Detector Evidence.

Two prosecution witnesses testified that Dr. Sheppard had refused to submit to a lie-detector test, although requested to do so by police. A third prosecution witness was permitted to testify that he *had* submitted to a lie-detector test. The trial judge refused to give an appropriate limiting instruction once this evidence was before the jury. The court below, in holding that the receipt of this testimony was the deliberate and tactical decision of Sheppard's trial counsel, have usurped the function of the Dis-

trict Court whose decision it is whether or not to assert waiver as a bar to otherwise appropriate habeas corpus relief.

IV. Illicit Communications to the Jurors.

During their deliberations, jurors were allowed to hold unmonitored telephone conversations with third persons. This was done in violation of an Ohio Statute which sanctions as felony the act of any court officer who permits such communication in the absence of express authorization of the trial judge. At the time these communications occurred, the jury was engaged in protracted deliberations which stretched to almost five days. The Christmas holidays were only a few days away, and community pressure sought a conviction. The presumption that proof of communications between jurors and third parties is prejudicial until their harmlessness is made to appear was disregarded by the majority below, which presumed the opposite.

V. Other Constitutional Violations.

The District Judge who released Dr. Sheppard on a writ of habeas corpus specifically reserved without decision, being unnecessary in the circumstances, several claimed violations some of which he thought to be of "significant merit." The court below dismissed these claims without articulated decision. One of these, arraignment in a capital case without counsel, is a clear constitutional violation by decision of this Court. Another, the seizure of petitioner's house, retention of possession of that house until after the trial was over, and concealment of evidence exculpating petitioner, clearly violated petitioner's federal constitutional rights to a fair trial and control of his own real estate.

VI. The Sufficiency of the Evidence.

There was presented at Dr. Sheppard's trial no sufficient evidence to sustain a conviction, and the appellate courts of Ohio which ruled to the contrary used a constitutionally impermissible standard in so doing. The court below relied upon a summary of the evidence compiled by the Court of Appeals of Cuyahoga County as being sufficient to show that this trial record is not barren of evidentiary support, which the said summary wholly fails to do. The paucity of proof against this petitioner is a further circumstance warranting a conclusion that he did not enjoy his constitutionally-protected right to a fair and impartial trial.

VII. The Accretion of Error.

The majority below incorrectly ruled that if no single claimed violation would warrant habeas relief, the aggregate could rise no higher than any individual error. Each claim of irregularity in a criminal case must be viewed against all of the circumstances in which it arose. Application of this principle to the case at bar requires the conclusion that this trial fell far below the minimum standards of due process.

Argument

I. The Petitioner Was So Thoroughly Tried and Convicted by News Media that a Fair Trial in the Courtroom Could Not and In Fact Did Not Occur.

A. *Introductory Note:* Certainly the primary issue in this case, and the issue of greatest general concern to our

courts, lawyers, and society is that of publicity tainting the trial. Although this Court has in earlier decisions dealt with the general question of invasive news media vitiating by their conduct a state criminal judgment, *Irvin* v. *Dowd*, 366 U.S. 717, *Rideau* v. *Louisiana*, 373 U.S. 723, *Estes* v. *Texas*, 381 U.S. 532, we believe that this case presents new and important questions somewhat different than those heretofore considered. Although *Irvin* and *Rideau* involved publicized confessions, and *Estes* turned on television within the confines of the courtroom, the Sheppard case embraces inherent vices at least as serious as, though somewhat different from, these former decisions.

In quantum of reported material, virulence of content and recklessness of method we believe the publicity in the case at bar to far transcend any other case heretofore decided by this Court. And in addition to this general condition, the petitioner here was further—and perhaps far more grievously—victimized by the deliberate, premeditated, specific malfeasance of one particular newspaper whose asserted purpose was to "get" Sam Sheppard. We think this admittedly strong claim to be demonstrable from the opinion and findings of the District Judge (Ra. 453a) and the record as a whole.

Our approach to the publicity issue, therefore, is on several distinct planes. We contend (1) that the pre-trial publicity produced the Sheppard trial and at the same time precluded the assembly of an impartial jury; (2) the publicity during trial prevented the maintenance of an impartial jury *if* one had been impanelled; and (3) the contrived and malicious conduct of the Cleveland Press before and during trial operated to deprive petitioner of due process of law even if no other news media had ever mentioned the Sheppard case.

B. *Publicity Before Trial:* Substantially all of the publicity printed in newspapers which appeared before trial is contained, as stipulated by petitioner and respondent in the District Court (Ra 297a), in the five green scrapbooks which are part of the record in this case. This is not to suggest that each Justice ought to examine these exhibits, for indeed this would be an unreasonable imposition; but inasmuch as the several lower courts which have reviewed this same evidence have come to startlingly different conclusions as to its content, counsel hasten to point out that although the articles upon which they place emphasis are necessarily selective, the whole is available for examination.

Although there is no direct evidence other than newsprint to prove the measure of publicity attendant upon this case, we respectfully suggest as a fair inference that other news media operative in 1954 (radio and television) generally accorded the matter coverage consistent with the interest evinced by the newspapers (although likely not the coverage given by the Cleveland Press).

The District Judge in his opinion set forth many of the articles and editorials which he thought to be most damaging (Ra 408a-447a). Additional material is reproduced in appendices to the dissenting opinion in the court below (Rs. 101-110). We have set forth some of this material, as it appeared to Cleveland readers in 1954, in the appendix to our petition for certiorari (Rs. 115-129). Although there is a plethora of additional newspaper evidence, we respectfully submit that this material alone is sufficient to determine the presented issues.

Also of significance are the opinions and conclusions of the numerous lower courts which have considered this case. In Ohio, the trial court—the Court of Common Pleas of Cuyahoga County—expressed a view upon the nature of the publicity, as did the Court of Appeals of

Cuyahoga County and the Ohio Supreme Court. Trial Judge Blythin, in denying a motion for new trial, wrote:

> "Seldom indeed has there been a case about which the average citizen was so confused by the published stories or more uncertain about what the facts actually were." (Ra 35a).

The Court of Appeals for Cuyahoga County wrote:

> "No case in this community ever attracted so much public interest or received so much attention by news disseminating agencies. Some of said publicity unquestionably was intended to spur on the investigation and was highly critical of the defendant and went so far in some instances as to have been designated in other newspapers as an attempt to try the case in the public press before he was indicted." (Ra 57a).

The Ohio Supreme Court described this publicity in terms that have become classic in the years that have intervened, and with language which would lead even the most naive law student to think that the majority were announcing a reversal:

> "Bell, J. Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. Special seating facilities for reporters and columnists representing

local papers and all major news services were installed in the courtroom. Special rooms in the Criminal Courts Building were equipped for broadcasters and telecasters. In this atmosphere of a "Roman holiday" for news media, Sam Sheppard stood trial for his life." (Ra 110a).

Three federal judges have now passed upon the nature and extent of the publicity in this case. District Judge Weinman, in ordering Dr. Sheppard's release, observed that:

(Ra 436a) "Suffice it to say that each of the three Cleveland newspapers repeatedly printed material which strongly suggested petitioner's guilt. Indicative of the suggestion of guilt was the repeated and extensive coverage given to petitioner's refusal to submit to a lie detector test or to receive an injection of truth serum."

* * *

"And particular mention must be made of the editorial in the Cleveland Press titled "BUT WHO WILL SPEAK FOR MARILYN" which was printed just prior to the swearing in of the jury, for it was indeed one of the most prejudicial. Ignoring the fact that it was a cheap, sobsister editorial, it literally screamed for petitioner's conviction."

(Ra 442a) "This Court * * * has no compunction in finding that the publicity was so prejudicial to petitioner that the assurances of the jurors must be disregarded for in the words of Mr. Justice Frankfurter, 'before they (the jurors) entered the jury box, their minds were saturated by press and radio * * * designed to establish the guilt of the accused.' "

(Ra 450a) "If ever there was a trial by news-

paper, this is a perfect example. And the most insidious violator was the Cleveland Press. For some reason that paper took upon itself the role of accuser, judge and jury. The journalistic value of its front page editorials, the screaming, slanted headlines and the nonobjective reporting was nil, but they were calculated to inflame and prejudice the public."

(Ra 455a) "By its actions in the Sheppard case, the Cleveland Press showed no respect for its responsibilities. If ever a newspaper did a disservice to its profession, if ever the cause of freedom of the press was set back, this was it. The failure of that newspaper and two other Cleveland newspapers to adhere to their responsibilities cannot be permitted to deny petitioner his right to a fair trial."

Circuit Judge Edwards, concurring fully with Judge Weinman's conclusions, described that publicity in various instances as follows:

(Rs. 59) "If ever a flagrant and tolerated interference of news media in a criminal trial served to deprive a defendant of his constitutional rights to due process and a fair trial, this surely must be such a case."

(Rs. 60) "A number of the most important and most prejudicial of the news media communications were drawn from sources completely outside of the trial record. These were not just news media inaccuracies or debatable comments in reporting court proceedings, they represented deliberate and highly prejudicial supplementation of the trial record."

(Rs. 60) "In a trial atmosphere which the Supreme Court of Ohio described as a 'Roman holiday

for the press', the news media were frequently allowed to become the dominant factor in a courtroom where a defendant was on trial for his life. The judge who presided at this trial repeatedly professed his inability to control these events."

(Rs. 64) "The Cleveland Press in front page headlines, editorials and cartoons berated official slowness, demanded an inquest, condemned the 'protection' of the 'chief suspect,' demanded the entrance of the Cleveland Police Department into the investigation, and demanded the arrest and the 'grilling' of defendant at police headquarters.

The inquest, the investigation by the Cleveland Police Homicide Unit, and the defendant's arrest and "grilling" followed hard on the heels of these demands.

Later, a representative of the Cleveland Press made the public boast that the Cleveland Press' handling of the Sheppard story produced the trial."

(Rs. 81) "If ever a jury could be said to be likely to have been 'impregnated by the environing atmosphere,' it was surely this jury."

(Rs. 82) "But on these same crucial issues, as the trial progressed the news media supplemented the total record with material never heard in the courtroom. Much of this material, though highly prejudicial to the defendant, was relevant and admissible if a witness could have been found who was prepared to testify to it under oath in the courtroom and face cross-examination. Some material, though equally prejudicial, was obviously inadmissible under any circumstances."

And the majority opinion of the court below, to which two Judges have subscribed, acknowledged that:

(Rs. 5) ". . . notwithstanding our agreement with the District Judge's characterization of the conduct of some of the Cleveland press as being shameful journalism, certainly not conducive to the judiciary's continuing concern for the freedom that the press insists should at all times be accorded to it. Contemporary American society would be greatly benefited if those members of the press and other media of information who offend in this regard were as conscious of and devoted to their responsibilities as they are solicitous that their privileges remain unimpaired. Good would also be the product of greater restraint by prosecutors and other members of the bar who indulge in public and truculent announcement of their trial plans and ammunition."

(Rs. 14) "Certainly little sophistication was required for a reader to become aware that the Cleveland Press entertained strong suspicion that Dr. Sheppard had killed his wife, although at times the Press suggested that Sheppard should clear suspicion from himself by submitting to adequate questioning. All of this was indeed stated in more violent and colorful language than we employ in attempting to summarize it."

(Rs. 15) "Certainly the Cleveland Press' discharge of its claimed duty in the Sheppard case could have been adequately pursued with less obtrusiveness. We need not here decide whether the Bay Village authorities, or the Cuyahoga County coroner or the Cleveland Police did or did not need the urging provided by the Cleveland Press. It has not been asserted that the police authorities were not without the faults charged to them, although it might fairly be inferred that the Press' meddling probably impeded more than it helped."

(Rs. 23) "We have emphasized that the publicity involved in the present case was not of a nature calculated to inspire confidence in the objectivity and good taste of the public news media."

(Rs. 32) "We wonder whether the flamboyant and sometimes shabby pretrial exhibitions of the press in this case . . ."

Petitioner does not hesitate to take the position that upon the facts which respondent is estopped to deny as a judgment of his highest court—that this trial was conducted in an "atmosphere of a 'Roman holiday' for news media"—the conviction must fall. Certainly all that is implicit in the bacchanalia of a "Roman holiday" is directly out of phase with the serious and ordered decorum which is supposed to be the controlling environment of our American criminal trials. And, notwithstanding the attempt of the majority of the court below to buttress its opinion with this Court's denial of certiorari in 1956, we believe that a recognition of this fact is solidly rooted in Mr. Justice Frankfurter's memorandum opinion explaining that denial (352 U.S. 910, 911); for after noting and quoting Judge Bell's now famous paragraph, he wrote that "such denial of (Sheppard's) petition *in no wise implies* that this Court approves the decision of the Supreme Court of Ohio." (Emphasis supplied)

Finally, as a factual premise to which our present argument will relate, we point to the role of the Cleveland Press and other news media as is singularly revealed by the statement of Editor Seltzer (Rs. 180-188). If the bull tactics of the Press prodded elective enforcement officials to action which they would otherwise not have initiated, certainly the echoing publicity of sister publications contributed to the general effective pressure.

We pause at this juncture to define the limits of our

argument. We do not suggest a wholesale shackling of the press as an appropriate remedy to insure fair trials. There may indeed be situations where the powers which flow from the First Amendment to our constitution are the only means by which corrupt officialdom can be brought to book. And in cases where the unrestrained juggernaut of a well-intended but misguided free press operates to deprive a citizen of his right to a fair trial, the courts have power to correct a tainted judgment. If there is, as scholars and learned judges now with increasing frequency suggest, a great collision between those paramount forces of the First and Fourteenth Amendments, there is at least some saving grace in the fact that the operation of the latter is always second in time, and abuses resulting from the unchained might of a free press may, in criminal cases at least, finally yield to the supervening corrective force of a dispassionate judiciary not forced to act in haste or in deference to measured deadlines. We thus concede that in appropriate instances news media may, and indeed ought to, cast their single or collective harsh light upon shady official conduct. If through misjudgment or premature castigation some injustice befalls a citizen, the courts can in part correct the wrong and the balance of grief may be laid to the price we pay for the division of powers which promotes and maintains our democracy.

But with these principles in mind, we similarly suggest that the considerable power with which a free press is invested is not entirely free from responsibility. Surely there can be found some limitations within whose perimeter news media can be required to function without materially diminishing that power necessary to their ability to attack and expose when the public is being duped by irresponsible official conduct.

To define this responsibility is no easy task. No facile

verbiage can set the limits upon a power as tremendous as that which our First Amendment embodies, for chains such as these must be carefully forged. And yet in the discharge of their responsibility and the exercise of their power the news media ought to be informed, by the tribunal which will belatedly but ultimately pass upon the propriety of their labors, what restrictions (if any) there may be.

Although several years' wrestling with the manifold and complex press — due process questions inherent in the Sheppard case tempt one to formulate a whole new set of rules governing the conduct of news media in criminal cases, the wisdom of the policy of this and other courts of last resort to avoid decision of problems not squarely presented is inescapable. We therefore suggest, in all humility, since this troublesome jurisprudential area is but vaguely charted two minimal standards below which the dip of news media ought to be sharply condemned:

> First, any deliberate and contrived effort on the part of a newspaper, radio or television station to cause or effect the prosecution of a citizen against whom no legitimate evidence, suppressed by authorities, can be shown to exist; or,
>
> Second, utterly reckless conduct on the part of news media which demonstrates a complete disregard for the rights of the citizen under attack.

These are, we believe, the lessons of the Sheppard case. Against all those newsmen in the Cleveland area who, although not the initiators of a personal attack on petitioner nonetheless risked irresponsibly the rights of Dr. Sheppard to a reasonably impartial jury in their efforts to capture first prize for the day in the competition for the most venal handiwork, we think the charge of recklessness

to be legitimately and dispassionately brought. As one example of such inexcusable recklessness, we submit the cartoon published by the Cleveland Plain Dealer on August 5, 1954, depicting petitioner as a Sphinx blandly but unconcernedly offering to help ascertain his wife's killer. No justification for this cheap bit of derision has ever been vouchsafed by any proponent of the Sheppard conviction, and it lives as proof that there exist in this country, as always, the pathological cowards who step boldly only to kick a man who is already down. The publication of this cartoon we cite as an example of recklessness. Examination of the other publicity extant in this case will disclose many more.

We think the allegation of deliberate malice to be suitably supported against the Cleveland Press. That paper did, as the District Judge has found, for some reason appoint itself to be accuser, judge and jury in this case. Its consciousness of the vulnerability of elective officials who would jump through hoops to win its support and avoid its displeasure is chillingly spelled out in Mr. Seltzer's autobiography, Chapter 26, set forth in the appendix to our petition for certiorari (Rs. 180-188). Against this kind of intimidation and control no sworn representative of the people had the gumption to stand, and as each mandate was sent down by the Press officialdom swiftly complied. We sincerely contend—and we read Chapter 26 of "The Years Were Good" (Rs. 180-188) to strongly endorse our position—without the deliberate pressure of the Cleveland Press there would have been no inquest, no arrest and no trial. Mr. Forrest Allen, one of the Press' most active reporters in the Sheppard case, said on radio (Station WHK in Cleveland, see Cleveland Plain Dealer, October 19, 1954) while the jury was being selected that the efforts of the Press had "produced the trial going on today."

We pause at this moment to direct attention at the response of the majority of the court below, whose judgment we attack, to this admitted interference by an agent of the Cleveland Press. In its opinion, the majority disclaimed recognition that such an utterance had ever occurred. (Rs. 15, n.5) The Dissenting Judge, however, noticed these remarks by Reporter Allen and laid stress upon "this public boast". (Rs. 64) When it was pointed out in our petition for rehearing that this boast was indeed part of the evidence documented in the case (pet. reh. 20) the majority amended its opinion by substituting for its earlier remark (Rs. 15, n.5) the following:

> "We cannot accurately assess the Press' self-evaluation of its own journalistic prowess." (Rs. 111)

We do not of course criticize the failure of the majority to note as fact Mr. Allen's remark in its original consideration of the case, for the morass of material before it offered great opportunity for such oversights. But faced with its mistake and with an admission by a primary agent of the newspaper found by the District Judge to have deliberately violated defendant's right to a fair trial, we respectfully suggest that the court below had a duty to do something more than assert its inability to "assess" this critical matter. Certainly this amended footnote does little to resolve the question, never squarely faced by the court below, of whether a trial "produced" by a newspaper can be or is in the circumstances consistent with due process.

The majority of the court below have emphasized, in distinguishing the case at bar from other cases involving pretrial publicity (cf. *Irvin* v. *Dowd*, 366 U.S. 717; *Rideau* v. *Louisiana*, 373 U.S. 723) that there was no publication of a *confession* by the defendant and thus no prejudice.

With this view we respectfully disagree. To borrow the most appropriate term from the opinion of the District Judge (Ra 453a), the prejudicial material levelled against Dr. Sheppard was "insidious" in every sense of that word. Boiled down from innuendo to essence, it suggested that although he was guilty he had secreted the evidence, and thus community protection demanded his conviction *unless he could prove* his "fantastic" story. With this seemingly logical but legally outrageous approach to an evidentially-scant case, the news media literally transferred the burden of proof to petitioner—a burden which he failed (but only partially, since this was obviously a compromise verdict by an uncertain jury (cf. Rs. 65)) to carry. We think that Dr. Sheppard on the eve of trial found himself in every bit as unfortunate a position as do defendants victimized by news revelation of alleged confessions or criminal histories *(Marshall* v. *United States,* 360 U.S. 310).

This Court has recognized that psychological pressure can be at least as effective as physical coercion in producing forced confessions. *(Spano* v. *New York,* 360 U.S. 315; *Rogers* v. *Richmond,* 365 U.S. 534) Application of this principle to the issue at bar compels the conclusion that subtle and insidious insinuations of guilt may go further toward prejudicing the citizenry than the publication of confessions, for these produce the gnawing fear that someone is "getting away with something" and promote a conscious or subconscious willingness to convict. The repeatedly asserted notion that Dr. Sheppard because of his influence, position and "hired" lawyers was blocking the discovery of evidence which would sew up the case against him prepared psychologically the attitude of the community for his conviction on scant proof. The notion of *confession* was everywhere implicit in the news articles and editorials; except in this case no articu-

lated confession was announced, as in *Irvin* and *Rideau*. The "confession" in petitioner's case was the one which officials through news media publicly claimed to be locked within Sam Sheppard's guilty mind, there to remain unless he could be subjected to an appropriate "grilling" (Rs. 116) by "third-degree" methods (Rs. 121).

Although police did eventually get to conduct their grilling interrogation—at length and with great vigor—no confession resulted. This failure to extract a statement of guilt was attributed to the delays suffered by those worthies who advocated this one method of crime solution as the sole logical and proper approach, and the notion that petitioner's confession, though unreachable because of his craftiness, was extant nonethless, was never dissolved. We believe the court below to have made a fundamental error in failing to recognize that a confession claimed publicly to be hidden can be every bit as damaging to an accused facing trial as a confession claimed to have been articulated.

In this argument directed to pre-trial publicity, we mention two additional specific instances: the inquest demanded by the Press and conducted by the coroner, and the publication of a complete list of veniremen twenty-five days in advance of trial.

The "inquest" in this case was a three-ring circus staged by Cuyahoga County Coroner Samuel Gerber to pacify the ranting of the Cleveland Press (Rs. 117). No other reasonable explanation for this proceeding can be proffered, since inquests are conducted to determine cause of death, and whether homicide is involved—hardly a question in this case from the first moment of the investigation. We assume that Dr. Gerber (who was and is a member of the Bar of the State of Ohio) had not called an inquest during the initial stages of the investigation because it obviously could not serve any useful purpose.

And it is apparent that the Press, which had been loud invoicing its disappointment in the failure of authorities to subject petitioner to the kind of rubber-hose interrogation which it repeatedly demanded, had thought an inquest an ingenious method to forcibly question Sam Sheppard under oath. As Mr. Seltzer has told us, Dr. Gerber scampered obediently into action to initiate the Press' scheme (Rs. 185).

The inquest was not held in the County morgue, but in a school gymnasium in Bay Village. At trial Dr. Gerber explained that he chose this locale because he wanted to have an audience (Tr. 3453) and because he wanted to "satisfy" the people (Tr. 3452). The possible or probable prejudice to petitioner apparently was not of concern to the coroner.

Sam Sheppard was called and made to testify; Sam's counsel was ejected, forcibly, from the proceedings because he had the temerity to object to the coroner's methods. Drs. Steve and Sam Sheppard were searched, in full view of the audience, as they entered the room.

The lady spectators were so enthralled by the nobility of Coroner Gerber's ejection of Defense Attorney Corrigan that they ran up to him and hugged and kissed him—a fact specifically noted by the District Judge (Ra 443a).

We mention the outrageous nature of this unnecessary sham proceeding because we believe that it served to drive deep the roots of prejudice in the Cleveland community; that a pre-trial proceeding may be relevant to a determination of the eventual trial has already been decided by this Court, *Estes* v. *Texas*, 381 U.S. 532.

The publication of the names of the veniremen in all three Cleveland newspapers twenty-five days in advance of trial was asserted by petitioner in his petition as one of the circumstances contributing to the unconstitutional nature of the proceeding now called his trial (Ra 6a),

stipulated to as having been the fact by both sides (Ra 298a), and noticed by the District Judge (Ra 406a). But the author of the majority opinion below has asserted as his personal experience the propriety of this procedure (Rs. 8, n.3), and can discern no vice in what occurred. If personal experience is of any worth the signatories to this brief do *not* recognize such publication as common practice in the various locales wherein they reside and practice law. But notwithstanding such disparity of professional experience, the practice of pre-publicizing the identities of citizens shortly to be charged with the disposition of serious and controversial criminal cases ought to be severely condemned. The evil inherent in such a situation is obvious: The moment one learns that one's neighbor is about to be a candidate for jury duty in a case which has provoked the community, the temptation to discuss the matter is irresistible. Such discussions cannot help but promote a concentration of information of every type and source being foisted off upon the talesman, until by the time he is finally impanelled he is so infused with extraneous information that impartiality is impossible. Although in cases where the defendant is highly popular such circumstances might militate to his benefit and prejudice the case for the government, we think that in the usual situation, human nature being what it is, the fact of indictment and impending trial is most likely to smoke out myriad stories about the accused which cast him as a bad type, always known to the informed as one who would probably wind up in such ignominy. There is little to be said in favor of informing the community just who will be the jurors in an important criminal trial, while there is a strong likelihood that prejudice to the defendant will be the result. We respectfully ask this Court to rule that publication of the names and addresses of the

veniremen, in all of the circumstances, entitled petitioner to either a continuance, or a change of venue, or both.

While we have vigorously emphasized the misconduct of the news media in general and the Cleveland Press in particular as the pervasive and primary vice in the pre-trial atmosphere, we are constrained to agree with the dissent below (Rs. 61) that the ultimate failure may have been judicial. Faced with the venality of the environment from which a jury had to be selected, the trial judge failed to take corrective steps. He did not invoke any of the safeguards and protections available in such cases. Although detailed argument of his failure is appropriate to this section, it is also germane to that portion of this brief dealing with the conduct of the trial judge as a whole, and to avoid redundancy we will discuss it there.

C. *Publicity During Trial:* As the record indicates, and the opinions of lower state and federal courts point up, Trial Judge Edward Blythin deferred defense motions for a continuance or a change of venue until the results of the voir dire examination of the jurors were before him. After impanelling thirteen jurors who stated that they were impartial, Judge Blythin denied all motions and proceeded with the trial. The District Judge found as a fact that the self-serving declarations of the talesmen could not be trusted in the hopelessly prejudicial atmosphere which prevailed (Ra 443a). The majority below set aside this factual determination as "clearly erroneous" (Rs. 113). It is therefore left for this Court to decide whether to apply the principles of *Irvin* v. *Dowd,* 366 U.S. 717, or *Rideau* v. *Louisiana,* 373 U.S. 723; or, indeed, whether the case at bar because of its unique facets must be tested by wholly new rules.

As the voir dire discloses, eleven of the jurors had read about the case prior to trial. In view of the material made

available by Cleveland newspapers in the three-month period prior preceeding trial, we believe that these admissions to having "read" about the case warranted the District Judge in applying *Rideau*. The available material generally and repeatedly announced Dr. Sheppard's guilt, and castigated him for failing to "cooperate" by confessing.

And even under the *Irvin* doctrine, this jury was not, as the trial judge (who had himself fallen victim to the prejudicial publicity) ruled, sufficiently impartial to pass muster. In support of this contention we cite two examples arising from the voir dire.

Juror Howard Barrish was perhaps the most candid. He disclosed that since the day he had learned that he was to be in the Sheppard jury pool he had diligently followed the case in the news media, reading all that he could so that ". . . if I was chosen I'd know something about the case." (Tr. 62) Suffice it to say that almost all of what Juror Barrish could have learned in this twenty-five day period must necessarily have equipped him specially to hear the Sheppard case—and to find Dr. Sheppard guilty. If Mr. Barrish did in fact pay careful attention to news of the case during the period in question, it is likely that he continued to supplement the drear of court proceedings with the much more lively offerings of the Cleveland Press (cf. Rs. 126-127).

At the other extreme was Mrs. Elizabeth Borke, the twelfth juror. She admitted that she received the Cleveland Press daily at her home, and nonetheless asserted that she had heard nothing about the Sheppard case. If ever there was justification for rejecting the sworn statements of a prospective juror, this was it. We can only assume that Mrs. Borke wanted very much to be chosen, and had gotten the word from some sources that the only avenue to acceptance was that of professed impartiality.

As the jury was being selected, the Press bannered its penetrating question "BUT WHO WILL SPEAK FOR MARILYN?" (Rs. 126) atop a four double-column innuendo which cannot be described as either article or editorial. It was a frank plea to the whole community to take pity on the poor decedent, the aggrieved and real party in interest, who was prevented from testifying only because her husband had killed her. We specifically invite the respondent, and the *amici curiae* from Cuyahoga County to provide one iota of explanation, justification or mitigation for this damnable and deliberate outrage. Certainly this tactic must represent the nadir of American journalism, and just as certainly it required a continuance or change of venue, or both.

On a second occasion the Press elicited ghostly testimony from the grave. On November 24, 1954, as the prosecution's case drew to a close, the Press bannered the asserted fact that Marilyn had viewed Dr. Sam as a "Jekyll-Hyde". The expected testimony of the "bombshell witness" was set forth on page one: Thomas Weigle, Marilyn's cousin, was ready to reveal the following day that she had used this exact term in describing the duality of her husband.

Of course in no jurisdiction in the United States (including Ohio) would such testimony have been admissible if it were available; and of course Thomas Weigle did not, when he did take the stand, offer such testimony. Nonetheless, on November 24 the jurors were in their homes in the evening, and many of them received the Cleveland Press, an evening newspaper.

The respondent seeks to pass these and other Press travesties aside as mere "inane and innocuous" reporting (Rs. 26). Neither article was by any means innocuous, and we doubt that either sprung from its author's inanity. We think both were calculated to help the Press avoid the consequences of an acquittal by promoting illegally a con-

viction. The "WHO WILL SPEAK FOR MARILYN?" effort conditioned prospective jurors on the eve of trial to believe that petitioner killed his wife before any evidence was heard. The "JEKYLL-HYDE" article was a deliberate effort to put before the jury false prejudicial and inadmissible material designed to fill the dangerous gap between petitioner's demonstrably phlegmatic nature and the manifest ferocity of Marilyn's killer. By characterizing a devoted and peaceable doctor (Jekyll) as "Mr. Hyde" (a sanguine monster) the Press supplied the essential link between defendant and crime which the prosecution could not provide with legitimate proof. We suggest that those jurors who read this article—or even saw the banner headline—cannot help but have noted this startling revelation and later wondered how Sam's lawyers had been clever enough to prevent Marilyn's statement from coming out in testimony.

Available to the trial judge whose decision it was to proceed forthwith in Cuyahoga County despite the pretrial publicity of which he had been made well aware, were several methods of attempting to preserve such impartiality as might have been captured during the impanelling. The first, most obvious and most effective would have been sequestration.

Petitioner alleged at the outset of this case (Ra. 7a) that the failure to take the jury into the custody of the court and shield it absolutely from extrinsic influence, was under the circumstances, a federal constitutional violation. Judge Weinman did not specifically pass upon the point, but both the majority (Rs. 9) and the dissent (Rs. 61) below gave it notice, from conflicting viewpoints. The majority bottom their conclusion that no error was committed on the ground that the record discloses no motion by the defense for sequestration.

But we think this to be no sufficient answer to petitioner's allegation. Unfortunately, petitioner's trial counsel, the

late and able William J. Corrigan, is now deceased and thus cannot explain what if any reason he might have had for failing to so move. But the majority below have speculated that Mr. Corrigan *did not want* the jury locked up (Rs. 9) so that they might enjoy the relaxation and refreshment of living at home, thus being in too benign a frame of mind to impose the death penalty; and the majority have done this speculation in the guise of refusing to speculate.

Second-guessing the moves of counsel embroiled in a high-powered, high-pressure murder trial eleven years after the event is at best a dangerous practice and hardly the appropriate plasma with which to sustain a whisper of life in a constitutionally sick conviction. We do know that Mr. Corrigan strenously objected to any trial at all. We may safely assume that he thought the trial judge would exercise some degree of control over the news media, instead of throwing up his hands in impotence each time a news invasion was brought to his attention (Rs. 60). It may be that he wanted and expected a mistrial (to which, we contend, he was in several instances entitled), and thought that this method would best serve and protect his client's rights.

In any case, if the trial judge intended to act with the *laissez faire* shown upon the record, we respectfully submit that he did indeed have a duty to sequester the jury *sua sponte*, and that the holding of the court below is plainly incorrect. It is clear that Dr. Sheppard had a right to have the integrity of his jury thus protected, and nothing in the record can be offered to show a waiver of that right, cf. *Fay* v. *Noia*, 372 U.S. 391. What the majority below have in fact said is that Sam Sheppard should serve a life sentence because his defense counsel made what appears in retrospect as a serious tactical misjudgment.

We pass next to the failure of the trial judge to adequately investigate the effects upon the jurors of certain

reckless and irresponsible news broadcasts. Walter Winchell announced in the course of the trial that according to one Carol Beasley, then under arrest in New York, Dr. Sheppard was the father of her illegitimate child. (Tr. 5429) On motion of defense counsel, the jurors were queried as a body by the trial judge, and two jurors said that they heard the broadcast, but would not be influenced by it.

This measure was, we believe, inadequate. The jurors should have been interviewed one by one, and questioned much more thoroughly. Of primary importance was whether the jurors who had heard this news (and it is likely that those who did not hear the newscast directly learned about it from others) *believed* that petitioner had fathered a bastard with a woman criminal. Such belief would necessarily have infected any impartial mind with prejudice, notwithstanding any stated assertions to the contrary. This is especially true in the circumstances of this case, where the prosecution made a concentrated effort to blacken Sheppard by casting him in the role of a Lothario.

But if this inquiry was inadequate, the absolute refusal to investigate the handiwork of Bob Considine violated Sheppard constitutional rights. Mr. Considine was good enough to voice an opinion on radio, during trial, that petitioner reminded him of Alger Hiss as he denied his guilt. (Ra. 448a) Alger Hiss was at the time nationally known to be a convicted perjurer. Thus in the view of the experienced and trial-wise Mr. Considine, Sam Sheppard was a liar. It would be foolish to say that a layman, unschooled and undisciplined in evidentiary jurisprudence could completely disregard the stated opinion of so considerable an expert.

The trial judge, as was his wont, reacted to this incident by saying "the court can't control everybody." He then went on to say that he would not control his jury by

questioning them because, "We are not going to harass the jury every morning." (Ra. 448a)

The District Judge found this refusal to be of constitutional significance. The majority below endorsed the position of the trial judge as discretionary, and added the following remarkable observation:

> "We believe that this action was itself within the discretion of the judge, and that it may indeed have been the best thing to do. A discreet judge might well conclude that repetitive reference and inquiry as to matter prejudicial to the defense would harm rather than help. A substantial number of lawyers skilled in the art of advocacy would, we think, agree." (Rs. 30)

What this substantial number of trial advocates might feel—if indeed any of this ilk could be assembled, which we respectfully doubt—is not material, for Mr. Corrigan was charged with defending Dr. Sheppard and he *did* specifically request inquiry. Mr. Corrigan is the only skilled advocate—and his ability as a trial lawyer the court below was frequently at pains to acknowledge (Rs. 9, 49)—with which this case is concerned. Nor would a decision by the trial judge to withold interrogation as a boon to Dr. Sheppard be in any sense a correct exercise of discretion. He was not counsel for the defense, and had no right to supervene the judgment of Mr. Corrigan as to what rights ought to be waived once they had been asserted. This failure to adequately blanket the jury from extrinsic influence, coupled with the failure and refusal to investigate the effects of highly prejudicial material to which the jury was known to have been exposed, vitiates, we believe, the conviction on constitutional grounds. This is especially true since the trial judge at no time ever *ordered*—as the

dissent below has observed (Rs. 62)—the jury to assiduously avoid contact with news items concerning the case. We do not intimate that this would have been a sufficient protective device for such avoidance of contact in Cleveland in the fall of 1954 would have been as a practical matter virtually impossible. But this omission by the trial judge aptly demonstrates that he did not undertake to protect his jury with the vigor and care for which this cardinal responsibility called.

As one additional representative example of the sort of prejudice with which the trial community was saturated during the proceedings, we point to the attempted impeachment of the principal defense witness—Dr. Sheppard—by Cleveland Homicide Bureau Chief David Kerr (Rs. 110). Officer Kerr was never called to the stand by the State, but he announced publicly while Sheppard was testifying that he was a "bare-faced liar." This was the same David Kerr who announced on July 26, 1954, through the Cleveland Press, that had he been on the scene earlier in the investigation he would have immediately arrested petitioner for "investigation of murder" and through interrogation of petitioner would have solved the entire case in "four hours." This statement was issued by Kerr in Miami, where he had been vacationing, and where he had been able to discern that Dr. Sheppard was the guilty party—*by reading the newspapers!* Here again was the announced opinion of an ostensible expert which could not help but influence to some degree any juror who learned of it.

Our contention as to the issue concerning publicity during this trial is summarized, then, as follows:

> (1) The extent and venality of the publicity was probably sufficient to destroy any presumption of jury impartiality no matter what orders, instructions or inquiries might have been used; and,

(2) The failure of the trial judge to control or even try to control this continual infection of his jury by extrinsic material shows beyond any doubt that any presumption of impartiality is destroyed, and that *prima facie* this jury was probably biased.

D. *Disruption Of The Trial By Newsmen:* This Court has recently ruled, in *Estes* v. *Texas,* 381 U.S. 532, that intrusion upon a trial by newsmen which materially disrupts the somber decorum of the proceedings does not comport with minimum standards of due process. In that case television cameras were actually brought into court, and a small part of the proceedings were broadcast live.

In the case at bar, all but a few seats in the courtroom were assigned to newsmen by the trial judge. Aside from members of the defendant's and decedent's families, the public was barred from the trial except by special pass from the judge. (Rs. 158-164) A special room was set up adjacent to the courtroom for teletypes and other equipment. The jurors were repeatedly photographed, as was the defendant—without his consent. And the presence and activities of the newsmen was disruptive and disorderly, a situation which the trial judge did not adequately correct As examples we submit the following from the trial transcript:

"The Court: Will you wait just one moment, gentlemen, let's have perfect order until we have these matters disposed of." (Tr. 531)

"The Court: Ladies and gentlemen of the panel—let's have quiet, please—We will adjourn until 1:15 this afternoon." (Tr. 1168)

"The Court: Just one moment, please will you folks in the rear be kind enough to be very careful in moving? It just cuts off the speech and makes the

situation impossible. We will have to have quiet." (Tr. 2280)

"Counsel: I can't hear, your Honor, there is so much noise in this Court room."

"The Court: Can we have quiet in the rear, please. We will have to restrict the movements in this court room unless we have quiet. We just cannot continue." (Tr. 2326)

"The Court: Before we proceed further, it has been brought to the attention of the Court that some persons have undertaken on their own behalf to examine some of the exhibits in this case. Will all persons be kind enough to be warned now that there is no one to touch the exhibits or get near to them during the progress of this trial other than counsel in the case. Please observe that from now on." (Tr. 3075)

"Counsel: Will you allow me to finish my questions before you all laugh. Put it in the record that the audience in the rear, the reporters, television men laugh in this case where a man is on trial for murder for his life." (Tr. 3276)

"Mr. Corrigan: Will you put in the record that at this time the audience broke into loud laughter".

"Mr. Danaceau: We object to that. There was not any loud laughter."

"The Court: Yes, the Court will say it was not loud laughter. Certainly there was some laughter." (Tr. 4498)

"Mr. Corrigan: Now, let's have some quiet back here, will you, gentlemen?"

"The Court: Yes, let's have quiet, gentlemen." (Tr. 4532)

"Mr. Corrigan: Was when? I could not hear you." (Tr. 4850)

"Mr. Corrigan: There seems to be so much noise back here, your Honor, people going in and out, the door slamming. Can't we have a little quiet?"

"The Court: Unless we can have this movement decreased, the court will have to close that door." (Tr. 6251)

"Mr. Mahon: May we have an answer?"

"Mr. Parrino: We can't hear, Doctor."

"Mr. Mahon: We can't hear you." (Tr. 6260)

"Mr. Corrigan: There is so much noise out there."

"The Court: I don't know where it comes from."

"Mr. Parrino: It is in the hall, Judge. I will see if I can quiet them down."

"Mr. Corrigan: Tell them to be quiet." (Tr. 6779)

As Judge Weinman observed:

"It is one thing to accomodate the news media; it is quite different when a major portion of the courtroom is reserved for it. Here a comparatively small courtroom was reserved primarily for the news media and the trial was its showpiece. The Supreme Court of Ohio characterized the atmosphere surrounding the trial as a 'Roman holiday for the news media'. Under such circumstances the requisite atmosphere for a fair trial could not, and in fact did not, exist." (Ra 451a)

This finding of fact, which the majority below were not entitled to set aside (Rs. 113) because they could not show such findings to be, and did not show them to be, "clearly erroneous", falls squarely within the principle of the *Estes* decision. Without further belaboring the point, we submit that such tolerated and uncontrolled interference by newsmen is repugnant to our whole concept of a criminal trial; when viewed as an aggravating circumstance against the

entire framework of the Sheppard case, we believe the District Judge to have acted well within the powers granted to him in voiding this conviction.

II. THE TRIAL JUDGE WAS NOT SUFFICIENTLY IMPARTIAL TO PRESIDE AT THIS PROCEEDING, AND SHOULD HAVE VOLUNTARILY RECUSED HIMSELF:

The judge who presided at this trial, Edward Blythin, said to a court clerk before Sam Sheppard was ever arrested," . . . Sam Sheppard is as guilty as I am innocent." (Ra 456a) While the jury was being impanelled, he volunteered to the late Dorothy Kilgallen, "It's an open and shut case . . . he is guilty as hell. There is no question about it." (Ra 457a)

The trial judge assigned the case to himself, knowing full well that he was up for election early in November, 1954, at which time he would have to look for approval of his judicial conduct to the electorate. On November 3, 1954, Judge Blythin won reelection by what was described by the Cleveland News as "the most one-sided trouncing of the election" (Rs. 101).

The chief prosecuting attorney, John J. Mahon, also won judicial office on that date; Judge Blythin allowed himself to be photographed with Mahon in a pose of mutual congratulation (Rs. 101). This manifest cameraderie between the presiding judge and counsel for the State was not paralleled by any similar demonstrable relationship with defense counsel.

When highly critical motions for continuance or change of venue were pending, the Cleveland Press ran a puerile but highly laudatory congratulatory editorial praising Judge Blythin. (Rs. 20), while at the same time editorializing critically the efforts of defense counsel to collect evi-

dence of community prejudice which would force a change of venue (Rs. 21).

The District Judge ruled that under the circumstances, Judge Blythin had a duty to recuse himself or at least make his sentiments known to counsel in order that they be afforded an opportunity to file an affidavit of prejudice. (Ra 457a). Because appellate courts in Ohio continually relied upon the discretion of Judge Blythin in assessing Sheppard's various claims of error, Judge Weinman held that his state of mind was not sufficiently impartial to correctly perform such a delicate task.

Before proceeding to argue this issue on the facts set forth, we pause to mention the point that there is no glee in discussing the malfeasance of a jurist who is deceased and unable to come to his own defense. The District Judge noted his reluctance to condemn a deceased brother member of the judiciary (Ra 458a), and the majority in the court below came to Judge Blythin's defense with manifest indignance; in the process of so doing, that court ruled that he was a proper person to preside at a murder trial of these proportions, notwithstanding his asserted absolute belief in petitioner's guilt before a shred of evidence had been presented to him (Rs. 34-43). We think this latter conclusion to be plainly incorrect in principle, and in the circumstances of this case.

First, accepting as fact (Rs. 39) Judge Blythin's pretrial state of mind with respect to the merits of the case, one is compelled to ask, "How did he form this damning opinion?" While it is possible that he had the conclusions of his son, who was a member of the Cleveland Homicide Unit, as a basis (see Ra. 461a), there is no evidence to sustain such a proposition. We think it more probable under the circumstances that Judge Blythin—perhaps subconsciously—had been so personally inundated with the guilt-riddled reporting of the news media that he was

persuaded of Sam Sheppard's guilt based on what he had read. If an experienced and disciplined jurist could be so influenced, then no stronger case can ever be made out against pre-trial publicity.

But no matter what the source, he was wrong to harbor this opinion in advance of trial. This was not a case where a defendant had pleaded guilty and withdrawn his plea, as analogized by the majority below (Rs. 40). Nor had there been any preliminary hearing from which Judge Blythin might have learned of some strong proof against Dr. Sheppard. As this trial opened there had not been presented anywhere except in the news media facts indicative of guilt, and even these—more innuendo than fact—should be regarded as less than persuasive by a judge.

But if Judge Blythin was compelled to believe that petitioner was guilty by non-evidentiary forces, he could commit no more serious breach of his office than to go one further step and consider the case "open and shut." This we think to have been the greatest wrong of all. Recognition of his personal prejudice in a subjective sense should have inclined this judge to align his conduct to the highest standard of objectivity attainable, guarding every minute against the possibility that his personal bias might infect his rulings of law. Upon the evidence, we submit that in the mind of this trial judge the trial itself was but a necessary formality pointed inexorably from the outset toward petitioner's certain doom.

The majority below have misconstrued the principles of *Tumey* v. *Ohio*, 273 U.S. 510, and *In Re Murchison*, 349 U.S. 133. In both cases this Court found the circumstances to be such that the presiding judge ought not to have rendered judgment—*not* because of any specific demonstrable misconduct, but because of inherent influences inconsistent with the *likelihood* of complete objectivity:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness." (Emphasis supplied) *In Re Murchison*, 349 U.S. 133, 136.

"Every procedure which would offer a *possible* temptation to the average man as a judge * * * not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law." (Emphasis supplied) *Tumey* v. *Ohio*, 273 U.S. 510, 532.

And beyond the guidance which Judge Blythin might have received from recognition of these general principles, there had been only weeks before the trial a decision rendered by a brother judge of the Court of Common Pleas, Cuyahoga County, *in this same case.* By the criteria laid down in that decision, Judge Blythin was in no wise qualified to sit and preside over this trial:

"He must not have an opinion in advance of hearing facts. At that period in the process, he must and should have no opinion, leaving his mind open, subject to proof of established facts. To reverse this guarantee and require proof to dislodge or modify an earlier acquired notion of conviction is to subject the defendant to a process not anticipated or permitted under our laws.

In view of the circumstances surrounding the nature and investigation of the crime and other preliminaries leading to the arrest of the accused, it is not unusual or strange to find a public official of the affected community thrown into a maelstrom of conversations, accusations and rumors which are found to abound in all such occurrences. But those likely to be drawn

into the matter in an official capacity should reserve their decisions and bridle their tongues. This is especially true where the case may require their judicial determination." *State* v. *Sheppard*, 121 N.E. 440, 442. (Court of Common Pleas, Cuyahoga County, Ohio.)

The majority below have sought to pass aside the evidence of severe bias on the part of the trial judge on the ground that he is not shown to have committed any specific acts of misconduct in open court, and by quoting several of his statements for the record wherein he announced impartiality. Although we believe this measure insufficient to compensate for the inherent danger in the judge's state of mind, we think that this effort fails of its own accord.

In several instances the majority below have endorsed critical rulings by this trial judge as within his sound discretion. (Rs. 9, 30) The District Judge observed that the appellate courts of Ohio had done likewise (Ra 460a). As we understand the principle underlying the grant of discretion to a trial justice, it is thought that one on the scene when a given question is presented, who is aware of all the attendant circumstances and conditions, is usually in a better position to render some delicate judgment than are reviewing jurists who have only the cold record before them. Certainly the fate of a defendant on trial for crime is controlled to a large extent by these discretionary rulings. In this case in particular, any one of many rulings made by Judge Blythin—always in favor of the State—could easily have changed the outcome:

(1) Judge Blythin failed to disclose to defense counsel that he felt Dr. Sheppard to be guilty, or that he regarded the case as "open and shut", thus

denying the defense its right to have him disqualified.

(2) Judge Blythin denied motions for a continuance and change of venue which would have taken the case out of the hostile Cleveland atmosphere, or postponed it until emotion could simmer down.

(3) Judge Blythin went to extraordinary lengths to accommodate news media, depriving petitioner to a large extent of his right to a public trial and permitting the proceedings to degenerate to a "Roman holiday" atmosphere.

(4) Judge Blythin repeatedly failed or refused to ascertain possible infection of the petit jury after it was called to his attention that highly prejudicial and inadmissible information was being disseminated, and that the jurors were exposed to it.

(5) Judge Blythin refused time and again to declare a mistrial because of this extrinsic supplementation of the trial record with prejudicial material.

(6) Judge Blythin failed to sequester the jury despite his decision to proceed with the trial in what he knew to be a highly-charged and volatile atmosphere.

(7) Judge Blythin refused a directed verdict after admitting that the evidence, at the close of the State's case, appeared to be in equipoise. (Rs. 175)

(8) Judge Blythin refused to allow the defendant access to his own home to search for exculpatory evidence, but ruled that the home "belonged" to the police. (Ra. 150a (10))

(9) Judge Blythin refused to grant a new trial notwithstanding proof presented to him that certain court officers had committed a felony under Ohio law by permitting the jurors to have unauthorized

and unmonitored communications during their deliberations.

(10) Judge Blythin refused to grant a new trial despite evidence presented after verdict (the Kirk affidavit) which surely would have changed the result.

It may of course be pointed out that one or both of the Ohio appellate courts reviewed these acts by the trial judge, and found no reversible error. But these courts placed reliance upon the judge's wisdom and discretion without *knowledge* of his secret views.

Finally, we raise the matter of the imminent election and the propriety of the trial judge presiding at the height of his candidacy. We think this case highlights for all time the inherent weakness in the elective method of staffing the judiciary.

Certainly this was a case where the hue and cry was up for Sam Sheppard's neck in a noose. The newspapers, and particularly the Cleveland Press had proclaimed petitioner's guilt in terms ranging from innuendo to outright accusation. The community awaited the trial with hungry anticipation. That same community was to decide, during the trial, whether Judge Blythin would keep his job.

Would this judge have dared to shift the case to another county, or postpone it, even if he sincerely felt that Sheppard was entitled to such relief? Would he have had the temerity to direct a verdict of not guilty even though he was satisfied that the State had failed to make out a prima facie case? And once the State had won its victory, would this judge under any conditions have taken the bold step of setting aside such a prize verdict?

There is indeed no reason to assume that the evils of trial by newspaper come to bear only on the jury.

"Usually the possible influence of the press on other than jurors is not even considered. Yet there is no reason why judges, lawyers, witnesses and law enforcement officials should be assumed to be more immune to social pressure than the twelve people in the jury box. Witnesses—like the participants in the Harvard experiment who, under social pressure, changed their minds about the lines they observed—may, under community pressure concerning the case being tried, change their minds about what they thought they saw at the scene of the crime. Judges too are vulnerable. In most states they have to seek reelection. They may yield, in the interest of retaining popularity, without even being aware of what they are doing. Attorneys (especially prosecutors) are also subject to subtle influence. Many of them have political ambitions." Lofton, *Justice and the Press*, 6 St. Louis Univ. L.J. 449, 477.

In closing we mention the doubtful propriety of Judge Blythin allowing himself to be shown warmly congratulating Prosecutor Mahon on the latter's accession to the bench. Endorsement of counsel for either side by the presiding judge ought, we think, to be assiduously avoided, especially where such endorsement may come to the attention of the jurors. Although it is not a major point, we think this circumstance is one of the many woven into this total issue, and mention it in that light. The event described brings to mind an interesting and perhaps agonizing question: Of the twelve jurors who voted as Prosecutor Mahon asked, how many had a short time before also voted for him on the county ballot; and to what extent might this prior commitment have promoted a subconscious desire to see one's elective choice prevail in his last and greatest case as counsel for the people of the State of Ohio?

III. The Use by the State of Ohio of Lie Detector Evidence Violated Petitioner's Federal Constitutional Rights.

The stipulations submitted by both parties to the District Judge show that prosecution witnesses were allowed to testify that petitioner had refused to submit to a lie detector test, and that a state witness was allowed to testify that he *had* taken such a test. (Ra 150a (12-15)) The District Court found this to be an error sufficiently grave as to violate the federal constitution.

The majority below did not rule that this assessment of the gravity of the error was incorrect, but avoided confrontation of that question:

> "The conduct of defense counsel regarding lie detector evidence has been discussed at length because we believe it spares us the need of determining the precise constitutional question suggested by the opinion of the District Court." (Rs. 47)

The court below did acknowledge the fact that many pretrial press accounts referred to Dr. Sheppard's refusal to take lie detector tests (Rs. 43), a fact painfully apparent from the numerous clippings on the subject in the green scrapbooks. One of the grounds asserted by Mr. Corrigan in seeking to continue the case or change its venue was the widespread public awareness of this refusal. The trial judge for reasons never articulated rejected this plea. Thus it is fair to assume that some or all of the jurors had at the outset of the trial information about the rejected tests.

When the testimony of Officer Schottke and Deputy Sheriff Rossbach that petitioner had refused their requests for lie tests was received, Defense Attorney Arthur Peter-

silge somewhat tardily objected. He pointed out to the trial judge that since the results of such tests were inadmissible, a refusal to submit should also be inadmissible. The court then told the jury:

> "Ladies and gentlemen, you are not to understand by these questions that any person is obligated to take any lie detector test. A person has his own choice. He is under no obligation whatever to take it."

Mr. Petersilge then asked the judge to go further and instruct the jury that test results would be inadmissible in any case. Judge Blythin responded:

> "Well, they are not here, anyway, Mr. Petersilge * * * we need not go beyond what we have in evidence. The evidence is here that he was asked to take it, he refused. Now, the Court tells the jury he doesn't have to take it, period. We will stop right there." (Ra 150a (14))

We think it a matter of common legal knowledge that evidence of the type complained of is inadmissible in every jurisdiction in the United States, except in a few limited cases where both parties stipulate to admissibility. Evidence by a state that a defendant has refused to take a lie detector test is fully as offensive to the federal constitution as evidence that he refused to testify against himself, for no lie detector test can be conducted unless the accused is willing to answer questions while attached to the machine. Further, there is an independent ground upon which such evidence is wholly improper in any trial, beyond the provisions of the Fifth and Fourteenth Amendments; and that is that the lie detector is not considered to be sufficiently reliable to warrant the admission of test results even when

these are offered by the defense with a waiver of all right against self-incrimination.

The majority have ruled that Dr. Sheppard may not now complain of this violation of his rights because the admission of the evidence in question was the *deliberate and tactical choice of petitioner's trial counsel.* (Rs. 47-49)

This approach to the issue in question—perhaps thought to be the only route with which to skirt this difficult issue—is incorrect in numerous respects.

First, it was for the District Judge to say whether petitioner had through the acts of his counsel waived a federally protected right. *Fay* v. *Noia*, 372 U.S. 391. If he had found as a fact that deliberate waiver had occurred, and in his discretion decided to assert that waiver to bar relief, he could have done so. But it is obvious that he found as a fact that there was no effective waiver; or that if there had been one, it ought not to be interposed to deny habeas corpus.

The majority below on this as on many other occasions have disregarded this power of the District Judge and usurped it for themselves, at a time when their gross speculations cannot be rebutted by petitioner with evidence—evidence which the respondent did not seek to elicit in the District Court, although he could have done so.

There is nothing in the record to support the conclusion that Mr. Corrigan actually desired to have evidence come in regarding Dr. Sheppard's inclination to shun the polygraph. If this were the case, he would have hardly permitted his assistant counsel (Mr. Petersilge) to have destroyed his tactic by making objection and asking for limiting instructions. That the defense was aware of the inadmissibility of lie detector evidence is demonstrable by Mr. Petersilge's citation to Judge Blythin of a decided case from within that very county (presumably *Parker* v.

Friendt, 99 Ohio App. 329, 118 N.E.2d 216, decided in 1954 —see Rs. 45).

Inasmuch as no trial lawyer in his right mind would wish to have a jury learn that his client had rejected what is commonly thought to be a scientific device capable of discerning guilt or innocence, absent other circumstances, it is necessary to consider what may have motivated Mr. Corrigan's inaction in the face of such highly objectionable evidence, having in mind the conditions in which the situation arose.

It is reasonable to assume we think, that Mr. Corrigan was satisfied that each and every juror knew about the lie tests and Dr. Sheppard's having declined to submit. He may well have felt that since he was wrongly forced to face a jury forearmed with such knowledge, objection to the evidence would only serve to highlight its apparent importance and that the better method would be to meet and explain it—something he should not have been forced to do. If his failure to vigorously object *was* a tactical maneuver, this certainly is the only reasonable explanation for it—and petitioner can hardly be penalized in the circumstances.

But the conduct of Mr. Petersilge—which Mr. Corrigan could easily have prevented if he had made a deliberate decision with respect to this decision—tends to undermine all possible theories of knowing and purposeful waiver. It is probable, in all of the circumstances, that Mr. Corrigan simply failed to grasp the enormity of the error which was being committed because of a lack of familiarity with this area of evidentiary law, and did not realize what absolute grounds for objection were presented. His many earlier attempts to obtain a mistrial suggest that he would never knowingly have passed by an opportunity of this sort.

This latter view is supported by the failure of defense counsel to press this issue on appeal, notwithstanding their omission to except to the inadequate limiting instructions

of the trial court. Additionally, there is implicit in the appeal by the defense of the testimony by *Houk* that he *had taken* a lie test (Ra 150a(15)), also inadmissible in any American jurisdiction, a recognition of the impropriety of lie test evidence in *some* context.

In any event, there is far too much speculation necessary to fabricate from this confusing and conflicting record circumstances showing waiver. This is doubtless why the District Judge did not pause to deal with this issue at length. The majority below should have respected his findings in this regard, instead of taking it upon themselves to put together a skein of shaky suppositions after the evidence at the hearing level had been closed.

IV. Unauthorized Communications to the Jurors During Deliberations Violated Petitioner's Right to Due Process of Law.

As the opinion of the Court of Appeals discloses, members of the Sheppard jury made certain telephone calls which were not authorized by the trial court. This was done in violation of two Ohio statutes. Section 2945.32, Ohio Revised Code, provides an oath to be administered to bailiffs in charge of a sequestered jury; it further provides that an officer violating this oath—as these officers did, unquestionably—may be punished by imprisonment for one to ten years. Section 2945.33, Ohio Revised Code, specifically prohibits any communication to a juror by an outsider.

The Ohio Supreme Court, in reviewing this question, refused to apply the ordinary rule that proof of communication to a juror raises a presumption of prejudice which stands until rebutted. *State* v. *Sheppard*, 165 Ohio St. 293, 298, 299. Ra 113a. The District Judge viewed this as a misapplication of Ohio law, but held that under the circumstances due process had been violated in any event. Ra. 473a.

The Court of Appeals rejected this ruling and held in essence that because defense counsel produced no actual evidence or prejudicial content in the telephone conversations, there was no error.

As the record discloses, the bailiffs from whose phones these calls were made did not dial the numbers or hear the voices of the parties called. In view of this we think the Ohio Supreme Court's pure speculation that these conversations were innocuous, and consisted of no more than "assurances of health and welfare" by the jurors' loved ones, to be completely unwarranted.

A leading case in this area of jurisprudence was twice before this Court in recent years. *Remmer* v. *United States*, 347 U.S. 227; *Remmer* v. *United States*, 350 U.S. 377. In that case it had come to the attention of the trial judge that a remark suggesting a "fix" had been made to a juror, and that subsequently an F.B.I. agent had questioned the juror while investigating possible jury tampering. Upon the first grant of certiorari it was determined that the record was inadequate to determine the possibility of prejudice and the case was remanded to the District Court for a hearing upon the merits, with the following admonition:

> "The presumption is not conclusive but the burden rests heavily upon the government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. Mattox v. United States, 146 U.S. 140, 148-150; Wheaton v. United States, 8 Cir., 133 F.2d 522, 527." *Remmer* v. *United States*, 347 U.S. 227, 229.

The District Court held a hearing as directed, and determined that there had been no prejudice to the defendant. In reversing and ordering a new trial, this Court held that

the evidence of extrinsic influence vitiated the judgment of conviction. *Remmer* v. *United States*, 350 U.S. 377.

In *Mattox* v. *United States*, this Court ruled that:

> "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least until their harmlessness is made to appear." *Mattox* v. *United States*, 146 U.S. 140, 150.

In reliance on this rule, the District Judge held that "There is nothing in the record to show the harmlessness of that part of the telephone conversations which the bailiffs could not hear. Accordingly petitioner's constitutional rights were violated." (Ra 474a)

The majority below flatly refused to apply this presumption, and ruled further that Mr. Corrigan should have adduced the content of the telephone calls when he had three jurors on the stand at the post-trial hearing where he sought to prove that such calls had been made. (Rs. 54)

In the peculiar circumstances of this case in general, and these deliberations in particular, any conjecture as to the harmlessness of these conversations—even *if* they involved solely juror's families, which the record does not show—is wholly unwarranted. This jury deliberated nearly five full days. They were locked up at a time when the Christmas holidays were nearly upon them. It is probable that their families were receiving a multitude of questions and opinions from friends and neighbors. In view of the fact that the Cleveland Press had the audacity to invade a juror's home during the course of the trial (Rs. 108), we have no assurance that this was its only visit.

Without knowing the exact text of those conversations which did take place—even to the inflection of the voice of

the third parties involved—we have no way of being sure that one or more jurors on the fence of acquittal did not get the idea from his or her spouse that such a result could inspire ostracism by the community. If any spouse believed this to be true, it would be almost beyond human temptation to resist some manifestation, subconscious or otherwise, of this grave personal fear.

In view of the stiff penalties Ohio exacts for violation of its unequivocal mandate prohibiting its court officers from permitting such outside communication (Section 2945.32, Ohio Revised Code), the refusal of the majority of the Ohio Supreme Court to reverse on this ground is evidence that that court unduly strained to prevent the collapse of this defect-riddled conviction. The District Judge pointed out quite clearly that he believed Ohio should have ruled that this incident required a new trial, but bottomed his holding on due process grounds nonetheless. (Ra 473a)

Certainly this issue is of sufficient general importance as to need clarification here. If the presumption proclaimed by *Mattox, supra*, is to guide litigation and decision of questions of this kind arising in state prosecutions, the lower federal courts should be so instructed. We believe that the language of the *Mattox* and *Remmer* cases clearly relates to a matter sufficiently critical and fundamental as to give it federal constitutional dignity, and that this Court should specifically affirm the ruling of the District Judge.

V. Other Questions—The Court Below Failed To Adequately Review Certain Significant Federal Constitutional Issues Presented By Petitioner.

Set forth in our petition for certiorari are certain other issues raised by the original petition foı a writ of habeas

corpus and briefed for but not passed upon by the District Court, which ruled that:

> "Each of the aforementioned errors is by itself sufficient to require a determination that petitioner was not afforded a fair trial as required by the due process clause of the Fourteenth Amendment. And when these errors are accumulated, the trial can only be viewed as a mockery of justice. For this reason, it is not necessary to consider the remainder of the 23 stipulated issues, which range from having significant merit to no merit at all." (Ra 475-76a)

The majority below stated that ". . . we have considered and found without merit the other claims of constitutional vice in the judgment convicting Dr. Sheppard." Rs. 57

These issues were *fully* briefed by both sides in the District Court, and those briefs are available for examination here (Ra 151a-294a)

We do not seek to impose upon this Court by asking it to decide these remaining questions without the benefit of lower court litigation. We do submit, however, that the summary phrase employed by the majority below, articulating no rationale for disregarding clear rulings by this Court in other cases (cf. arraignment without counsel, *Hamilton* v. *Alabama*, 368 U.S. 52), is woefully inadequate review and does not comport with the requirement of "full and fair" litigation of constitutional claims. *Townsend* v. *Sain*, 372 U.S. 293.

Of these questions reserved but not overruled by Judge Weinman, we suggest that at least one does indeed have significant merit. The stipulations and other materials show that the Bay Village Police virtually took over Dr. Sheppard's home from the day of the murder until the jury's verdict was in. Dr. Sheppard's letter demanding

that his realty be returned to him (Rs. 157) was to no avail; and at a point when Mr. Corrigan actually had these keys in his possession in the courtroom, in response to a subpoena, the trial judge ordered him to return them on the ground that they "belonged" to the police. (Ra. 150a(11))

These circumstances in and of themselves are, we believe, sufficiently egregious to warrant a presumption that Dr. Sheppard's rights were violated in flagrant disregard of the Fourteenth Amendment. Even though law enforcement officials may have had a right to search—which Dr. Sheppard permitted them to do for one and one half months—they did not thereby take title to his real estate.

In *Levin* v. *Blair*, 17 F.2d 151 (— Cir.), a warrant had been obtained for the search of defendant's brewery establishment. Pursuant to this warrant the entire premises were seized, and guards posted on the property. The court held that (p. 153) "Search warrants have nothing to do with real estate, beyond a search of it, and the officers have no right of possession, or to remain on the premises for a longer time than is reasonably necessary to execute the writ."

In *United States* v. *63,250 Gallons of Beer*, 13 F.2d 242 (— Cir.), the court ruled that a search warrant ". . . is not a writ in the nature of an attachment, directing a levy to be made upon the property found, entitling the officer to place keepers in charge of it on the premises searched . . . Undoubtedly the warrant carries with it the right to remain on the premises to be searched so long as it is reasonably necessary to complete the search and remove the property which he is authorized to seize. His continued presence after such reasonable time is without warrant of law." 13 F.2d 245.

And in *United States* v. *American Brewing Co.*, 296 F.2d 772, 777 (— Cir.), it was held that ". . . there is no authority conferred by a search warrant to search real estate. This

means that *it cannot be 'padlocked' or the possession of the owner in any way disturbed,* interfered with, or in any way curtailed excepting so far as may be reasonably necessary to the lawful execution of the search warrant." (Emphasis supplied)

The illegal seizure and maintenance of possession of this house by officials violated petitioner's right to a fair trial because it deprived him of a reasonable opportunity to discover evidence which might exculpate him at the place where it was most likely to be found—at the scene of the crime. We submit this as a due process violation because it denied him "an opportunity to present every available defense." *American Surety Co.* v. *Baldwin,* 287 U.S. 156, 168.

And in fact, we are able to show that this wholly improper and totalitarian conduct by the police probably did cost petitioner his verdict of acquittal. After the trial Dr. Paul Leland Kirk made an intensive investigation of the premises, and found evidence of blood in the murder room which could not have come from Dr. Sheppard or the victim. This piece of corroborative evidence would surely have instilled reasonable doubt in a jury which deliberated five days without it, and caused them to find that Dr. Sheppard's claim that one or more intruders had been in the bedroom that night was proven.

If the majority below did in fact recognize and consider this claim of constitutional violation, as well as the others reserved by Judge Weinman, we submit that they had an inescapable duty to illumine their bases for holding harmlessness. In failing to do so, they unconscionably deprived this petitioner of the review which these circumstances compelled.

As to those other errors briefly mentioned in our petition for certiorari (pp. 35-39) we rely upon their statement there. It is not proposed that their merits be reached in

this proceeding, but only that they be considered in determining whether they have been sufficiently litigated, and whether they may comprise some part of an aggregate of error which requires a new trial.

VI. The Sufficiency Of The Evidence Has Not Been Adequately Litigated Below.

In his petition asking that a writ of habeas corpus issue, petitioner claimed that the Supreme Court of Ohio had used a constitutionally impermissible standard in deciding that the evidence on record would support a conviction. Judge Weinman specifically ruled that he would not pass upon this issue: he did not rule that it had not been properly presented. (Ra 403a) The majority below made no effort to summarize any evidence tending to show that petitioner had killed his wife, but deferred to the summary of the Court of Appeals of Cuyahoga County as having demonstrated that the record was not so barren of evidentiary support as to violate due process. Rs. 58

This ruling must be sharply challenged, for the attempt by the Court of Appeals of Ohio (Ra 63a-80a) did not in fact approach accomplishment of its asserted objective of making out a circumstantial case against petitioner. All that was ever proved at trial was that Marilyn Sheppard had been murdered by someone. Any reasonable and objective view of the total circumstances of the case compels the conclusion—reached by Judge Kingsley A. Taft, dissenting in the Ohio Supreme Court (Ra 119a)—that Dr. Sheppard did not kill his wife.

We realize that this Court does not ordinarily reach the question of the sufficiency of the evidence in habeas corpus proceedings involving state convictions, and we do not ask that it do so now. But we do urge review of this issue to the extent that it be determined that further inquiry is

necessary before it can be resolved. The rules imposed upon the jury in accordance with Ohio law required them to acquit petitioner unless they found from the evidence no reasonable hypothesis save that of guilt. We think this could not have been done, and submit that in view of all of the other defects in this trial there can never be assurance that what would have in detached and dispassionately objective scrutiny appeared to the jurors as less than persuasive evidence that Dr. Sheppard was in any way responsible for his wife's demise, in the total circumstances of this case took on a twisted and warped aspect which tipped them over the fence to guilt.

VII. The Accretion Of Error As a Deprivation Of Due Process:

The majority below, in summarizing its assessment of the claimed constitutional violations which it had examined, observed that:

> "... we are unable to attribute to a combination of these several claims a constitutional potency they lack individually." (Rs. 56)

But Judges Weinman and Edwards both declared that a combination of error may require appellate relief where none of the individual errors, viewed in isolation, would do so.

In *Getchell* v. *United States*, 282 F.2d 681, 691 (5 Cir.), the court reversed certain mail fraud convictions with the following language:

> "Whether or not the failure to rule on that objection was error calling for reversal, or any one of the foregoing occurrences would, by itself, be plain error, the cumulative effect of all of them makes it all too prob-

> able that the jury's verdict was brought about, not by the weight of the evidence, but by the foregoing and other appeals to sympathy, passion and prejudice which the district court left unreproved."

In setting aside Judge Weinman's judgment and order, the majority adopted as their technique the isolation and dissection of each claimed violation wholly out of context of the proceeding in which it arose. While there may be errors so flat and final that no reference to the texture and weave of the trial fabric of which it is a defective thread is thought necessary, certainly no group of errors can be realistically evaluated without relating them to the entire background facts of the case.

While we vigorously contend, as the District Judge found, that the record in the case at bar discloses several transgressions of sufficient moment to require the issuance of the writ individually, we also assert that upon a view of the whole case there is no reasonable way to say that it is contained within the allowable perimeter of the Fourteenth Amendment. The combination of violations do indeed have a potency which perhaps no single violation has in and of itself: for whereas the issuance of the writ of habeas corpus is justified upon several distinct grounds, the accretion reduces what was supposed to have been a fair trial in the United States of America to an insult to the due process of law which is its backbone.

Conclusion

For the reasons stated above it is respectfully submitted that the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed, and the judgment of the United States District Court for the Southern District of Ohio affirmed with directions that petitioner remain

on bail unless and until the State of Ohio elects, within sixty days of the rendition of final judgment by this Court, to retry petitioner for murder in the second degree.

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January 13, 1966

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Supreme Court of the United States

OCTOBER TERM, 1965.

No. 490.

SAMUEL H. SHEPPARD,

Petitioner,

—vs.—

E. L. MAXWELL, Warden,

Respondent.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND OHIO CIVIL LIBERTIES UNION, *AMICI CURIAE*

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Supreme Court of the United States

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND OHIO CIVIL LIBERTIES UNION, *AMICI CURIAE*

Interest of *Amici*

The American Civil Liberties Union and its Ohio affiliate, the Ohio Civil Liberties Union, are organizations dedicated to the preservation of a free and open society, principally through the protections embodied in our Bill of Rights and the Fourteenth Amendment to the United States Constitution.

For many years, the American Civil Liberties Union and its affiliates have fought to defend and extend the First Amendment guarantees of freedom of speech and press, upon the clear principle that a free society cannot exist unless the persons within its boundaries are permitted—rather, encouraged—to express themselves by word and in print without fear of governmental restraint.

We note the significant role that a free press plays in helping to establish and preserve that free society; nothing which follows diminishes in any respect our full support

for the broadest latitude of public expression in the news media and elsewhere. This Court has amply demonstrated its own dedication to these principles.[1] But it is equally clear that freedom without justice is an empty view. "The safety of society and the security of the innocent alike depend upon wise and impartial criminal justice. Misuse of its machinery may undermine the safety of the State; its misuse may deprive the individual of all that makes a free man's life dear."[2] It has been observed that "not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community."[3]

The point at which free press and fair trial intersect in the administration of criminal justice—the notorious criminal trial amidst inflammatory publicity in an aroused community—presents serious and complex problems to those who would defend the principles of both freedom and justice. As the quantum and the techniques of the communications media continue to expand, as the public thirst for the contemporaneous details of notorious criminal trials continues unslaked, the quality of criminal justice in the courts of our land will be subjected to ever-increasing stresses unless this Court provides detailed working principles to guide the trial courts of the states (as well as the federal courts which it directly supervises) in the administration of this most difficult task.

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[1] See *Bridges* v. *California*, 314 U. S. 252 (1941); *Craig* v. *Harney*, 331 U. S. 367 (1947); *Pennekamp* v. *Florida*, 328 U. S. 331 (1946); *Wood* v. *Georgia*, 370 U. S. 375 (1962).

[2] *Pennekamp* v. *Florida*, 328 U. S. 331, 357 (1946) (concurring opinion).

[3] *Irvin* v. *Dowd*, 366 U. S. 717, 729 (1961) (concurring opinion).

In recent years, this question has been thrust forcibly and dramatically before the attention of the American public.[4]

This Court, on a case by case basis, has already begun the task of weighing the delicate due process considerations involved when a notorious criminal trial takes place in a community inflamed by massive prejudicial publicity.[5]

The case at bar provides the Court with yet a further opportunity to analyze and refine working constitutional principles to guide the trial courts through this most sensitive area of criminal due process. For, through the auspices of the Great Writ,[6] a number of varieties of prejudicial trial and pretrial publicity have been preserved for review by this Court.

In the firm belief that this case presents a clear opportunity for this Court to further delineate the federal constitutional standards of criminal due process as they relate

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[4] *Report of The President's Commission on the Assassination of President John F. Kennedy* (1964), pp. 231-242. "The experience in Dallas * * * is a dramatic affirmation of the need for steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial." P. 242.

[5] *Marshall* v. *United States*, 360 U. S. 310 (1959); *Janko* v. *United States*, 366 U. S. 716 (1961); *Irvin* v. *Dowd*, 366 U. S. 717 (1961); *Rideau* v. *Louisiana*, 373 U. S. 723 (1963); *Estes* v. *Texas*, 381 U. S. 532 (1965). Cf. *Shepherd* v. *Florida*, 341 U. S. 50 (1951) (concurring opinion); *Stroble* v. *California*, 343 U. S. 181 (1952).

[6] *Fay* v. *Noia*, 372 U. S. 391 (1963); *Townsend* v. *Sain*, 372 U. S. 293 (1963). "Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. * * * Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment; if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." *Fay* v. *Noia*, 372 U. S. 391 (1963).

to inflammatory publicity surrounding notorious trials, and in the hope that in some measure *amici* may be of assistance to the Court in performing its delicate task of assuring that "the conclusions to be rendered in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print"[7] while "refusing to sacrifice freedom of press to the whims of judges,"[8] this brief is filed.

The written consent of the parties to this appearance *amicus* has been obtained and filed with the Clerk of the Court.

Statement of Facts[9]

On December 21, 1954, petitioner, Samuel H. Sheppard, was convicted of murder in the second degree for the slaying of his wife after a sensational jury trial which captivated the attention of the nation.

Marilyn Sheppard, petitioner's pregnant young wife, had been bludgeoned to death in the bedroom of her lakeshore home during the early morning hours of July 4, 1954. Petitioner told police and testified in court that he had been wakened from his sleep on a couch in the downstairs living room by a noise or cry from upstairs, ascended the stairs, and was knocked unconscious while grappling with an unidentifiable white form standing next to his wife's bed. He further stated that upon recovering, he pur-

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[7] *Patterson* v. *Colorado*, 205 U. S. 454, 462 (1907).

[8] Douglas, J., *The Public Trial and the Free Press*, 33 Rocky Mt. L. Rev. 1 (1960).

[9] Except as otherwise indicated, the facts have been taken from an agreed pretrial order set out in full in the opinion of the district court; the pretrial order is reprinted in the appendix to this brief at 2a-6a.

sued the form out of the house, to be again knocked out while struggling on the shore. Petitioner has consistently denied guilt from the date of the murder until and including the present time. He at first denied, but later admitted having had sexual relations with a former employee of the hospital upon whose staff petitioner served as a doctor of osteopathic surgery. The prosecution contended that this affair was the motive for premeditated murder, although the jury verdict did not support a finding of premeditation.

Petitioner was arrested for murder on July 30, 1954; he was admitted to bail and indicted a few days later, on August 17, 1954. He remained in custody thereafter until his trial. The nine-week trial began on October 18, 1954; the jury began its deliberations on December 17, 1954 and five days later a verdict of guilty of murder in the second degree was returned. Petitioner was thereafter sentenced to life imprisonment in the Ohio Penitentiary.

The news coverage of the murder, the pretrial investigation and the subsequent trial was massive, detailed, pervasive, inflammatory, colorful and "not of a nature calculated to inspire confidence in the objectivity and good taste of the public news media."[10] The trial and pretrial publicity which permeated the atmosphere in which petitioner stood trial for murder was succinctly described by the Ohio Supreme Court in reviewing his conviction:

> "Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps

[10] S. 23, majority opinion of Sixth Circuit Court of Appeals. Throughout this brief, the prefix "S" followed by a page number refers to the appendix attached to the petition for certiorari. A page number followed by an "a" refers to the appendix attached to this brief, and the prefix "R" followed by a page number refers to the transcript of the record.

> unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. Special seating facilities for reporters and columnists representing local papers and all major news services were installed in the courtroom. Special rooms in the Criminal Courts Building were equipped for broadcasters and telecasters. In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life." 165 Ohio St. 293, 294, 135 N. E. 2d 340, 342 (1956).

An adequate summary of the barrage of publicity which inundated the community before and during petitioner's murder trial is beyond the scope of this statement of facts.[11] For purposes of this Court's review of the petitioner's habeas corpus application, however, the damaging trial and pretrial publicity may be categorized as follows:

1. Publicity relating to the strength of the state's case or the guilt of the accused, procured or cooperated in by state law enforcement authorities.[12]

2. Publicity relating to testimony of witnesses not offered at trial by the prosecution.[13]

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[11] Examples of some of the newspaper clippings, photographs and editorials which appeared in Cleveland journals are appended to the petition for certiorari and this brief. All of these materials which appeared in Cleveland newspapers between the dates of the murder and petitioner's conviction are collected in bulk in five green scrapbooks certified to this Court by the Court of Appeals. Additional examples are discussed in the argument, *infra*.

[12] E.g., S. 110, S. 125, S. 126, S. 127, 54a-55a.

[13] E.g., S. 109, S. 110, S. 126, S. 127, 13a-14a, 44a-45a, 47a.

3. Publicity relating to evidence which would have been inadmissible if offered at trial.[14]

4. Publicity which made celebrities of the trial jurors.[15]

5. Publicity charging guilt or attacking the character of the accused.[16]

Because of the inflammatory atmosphere generated by the adverse publicity, defense counsel moved for a continuance, change of venue and mistrial both before and repeatedly during the trial.[17] All such motions were denied by the trial court.[18]

During the course of the jury empanelling, 13 of the 64 prospective jurors examined were dismissed for cause because they had prejudged the guilt or innocence of the accused.[19]

While the jurors who were ultimately empanelled were sworn to impartiality, eleven of the twelve who returned the verdict admitted exposure to the pretrial publicity,[20] one had paid particular attention to each detail of the case offered by the news media, the better to discharge his duties as a juror,[21] and the twelfth juror, although asserting that,

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[14] E.g., S. 119, S. 120, 10a, 12a, 13a, 21a, 37a, 54a.

[15] E.g., S. 103, S. 105, S. 106, S. 107, S. 108, S. 128.

[16] E.g., S. 115, S. 116, S. 117, S. 118, S. 119, S. 120, S. 121, S. 122, S. 123, S. 124, S. 125, S. 126, S. 129, 23a, 24a, 30a, 58a, 60a.

[17] R. 4, 119, 818, 1352, 1614, 1617-18, 1633, 2355, 3719, 5009, 6815.

[18] R. 1352-1354.

[19] R. 46, 48-49, 180, 284, 288, 331, 336, 338, 740, 746, 884-5, 1023-4, 1043-4, 1157, 1161, 1511.

[20] R. 52, 184, 347, 352-3, 418, 437, 440, 461, 475, 482, 750, 762, 1114, 1214, 1240, 1306, 1342, 1464-5, 1492, 1547.

[21] R. 61-2.

during the period of more than three months between the murder and the commencement of the trial, she had heard nothing about the case, admitted receiving the Cleveland Press daily at her home.[22]

The trial court did not sequester the jury; consequently, all of the jurors were permitted to return to their homes when court was not in session during the nine-week trial.

Since his conviction and the denial of his motion for new trial, petitioner's attempt to obtain a new trial has been the subject of sustained litigation for the past eleven years. Both his conviction and the denial of his motion for new trial were affirmed by the Court of Appeals for Cuyahoga County, Ohio.[23] The Ohio Supreme Court dismissed an appeal from the decision affirming the denial of a new trial,[24] and affirmed the conviction,[25] two judges dissenting. Application for certiorari was denied by this Court[26] and his application for rehearing was also denied.[27] Petitioner's

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[22] R. 124, 127-8, 142.

[23] *State* v. *Sheppard*, 100 Ohio App. 345, 128 N. E. 2d 471 (1955); *State* v. *Sheppard*, 100 Ohio App. 399, 128 N. E. 2d 504 (1955).

[24] *State* v. *Sheppard*, 164 Ohio St. 428, 131 N. E. 2d 837 (1956).

[25] *State* v. *Sheppard*, 165 Ohio St. 293, 135 N. E. 2d 340 (1956).

[26] *Sheppard* v. *Ohio*, 352 U. S. 910 (1956). Justice Frankfurter's memorandum opinion concurring in the denial of certiorari, however, was careful to point out that "[s]uch denial of his petition *in no wise implies that this Court approves the decision of the Supreme Court of Ohio* [denying petitioner's claim that the publicity surrounding his trial deprived him of due process of law]. It means and means only that for one reason or another this case did not commend itself to at least four members of the Court as falling within those considerations which should lead this Court to exercise its discretion in reviewing a lower court's decision." (Emphasis and bracketed material supplied.) 352 U. S. 910, 911 (1956).

[27] *Sheppard* v. *Ohio*, 352 U. S. 955 (1956).

subsequent petition for a writ of habeas corpus to the Ohio Supreme Court was denied.[28]

On April 11, 1963, petitioner filed an application for a writ of habeas corpus in the United States District Court of the Southern District of Ohio, charging that his conviction was constitutionally defective in a number of respects, including a denial of due process of law resulting from the adverse newspaper publicity before and during his trial. On July 15, 1964, the district judge concluded, upon examining the trial and pretrial publicity and other matters, that petitioner did not have a fair trial and that his conviction was, therefore, inconsistent with the United States Constitution, ordered his release on bail from the Ohio Penitentiary where he had been confined under a life sentence since his conviction in 1954, and granted the State of Ohio sixty days within which to take further action against petitioner.[29]

Respondent appealed the order of the United States District Court which voided the state court conviction. On May 5, 1965, the Sixth Circuit Court of Appeals (two judges for the majority and one dissenting) reversed the judgment of the District Court and remanded petitioner to the custody of respondent.[30] Thereafter, a petition for rehearing was denied and on July 26, 1965, the Court of Appeals stayed the mandate pending application for certiorari to this Court.

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[28] *State ex rel. Sheppard* v. *Alvis*, 170 Ohio St. 551, 167 N. E. 2d 94 (1960).

[29] *Sheppard* v. *Maxwell*, 231 F. Supp. 37 (S. D. Ohio 1964). See pertinent excerpted material from this opinion reprinted at pp. 1a-53a, *infra*.

[30] The opinion of the Court of Appeals is reported at 346 F. 2d 707 (6th Cir. 1965) and is reproduced in the appendix to the petition for certiorari at S. 1.

Petition for writ of certiorari was filed August 24, 1965 and was granted on November 15, 1965.[31] The petitioner remains at large on bail.

Summary of Argument

In protecting due process of law, this Court has frequently held that, in order to reverse a conviction, actual prejudice to the accused need not be shown where the circumstances were inherently suspect constitutionally. *Tumey* v. *Ohio,* 273 U. S. 510 (1927); *In re Murchison,* 349 U. S. 133 (1955); *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *White* v. *Maryland,* 373 U. S. 59 (1963); *Turner* v. *Louisiana,* 379 U. S. 466 (1965). This principle has been recently applied to reverse state criminal convictions on the ground that prejudice was inherent in the trial and pre-trial publicity, without a showing of actual prejudice to the accused. *Rideau* v. *Louisiana,* 373 U. S. 723 (1963); *Estes* v. *Texas,* 381 U. S. 532 (1965).

Certain types of trial and pre-trial publicity, all present in quantity and intensity in the case at bar, are inherently prejudicial to the accused because they necessarily deny him a fair trial by both judge and jury.

These varieties of publicity include:

I. Damaging publicity procured or cooperated in by state law enforcement authorities.

II. Damaging publicity relating to prospective testimony of prosecution witnesses not actually offered at the trial by the prosecution.

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[31] 86 S. Ct. 289 (1965).

III. Damaging publicity describing evidence which, if offered by the prosecution at trial, would have been inadmissible and constitutionally prejudicial.

IV. Publicity which makes well-known personalities of the trial jurors.

V. Damaging publicity of an accusatory nature, whether or not participated in by law enforcement authorities, which charges guilt or attacks the character or reputation of the accused.

Petitioner has, consequently, been denied due process of law and is entitled to habeas corpus relief.

Argument

Although this Court has scrupulously guarded the right of the independent press to publish out-of-court news and editorial comment about pending judicial proceedings virtually without governmental restraint,[32] within the past half-dozen years[33] it has become increasingly aware of, and shown a willingness to deal with, the consequences to fair

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[32] *Bridges* v. *California*, 314 U. S. 252 (1941), established that press freedom was entitled to "the broadest scope that could be countenanced in an orderly society," subject only to the requirement of the clear and present danger standard, defined as "a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." See also *Craig* v. *Harney*, 331 U. S. 367 (1947); *Pennekamp* v. *Florida*, 328 U. S. 331 (1946); *Wood* v. *Georgia*, 370 U. S. 375 (1962).

[33] But five years after the petitioner's trial and three years after the denial of certiorari on his direct appeal.

trial[34] of untrammelled publicity, both in federal[35] and state[36] criminal prosecutions.

A critical issue in each of these cases has been the kind and quantity of evidence in the record sufficient to show prejudice to the defendant requiring reversal. That this issue should be of prime concern in this area is not a surprising matter, both because prejudice resulting from publicity "may be so subtle that it escapes the ordinary methods of proof," [37] and because of the normal reluctance of a juror to concede his bias before his peers.[38]

In its earliest consideration of cases in this area beginning with *Stroble* v. *California,* this Court apparently re-

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[34] The source of the constitutional command upon state courts to provide fair trials for those accused of crime is, of course, the Due Process Clause of the Fourteenth Amendment, either standing alone or coupled with the Sixth Amendment. Whether the Sixth Amendment as a whole applies to the states through the Fourteenth, cf. *Adamson* v. *California,* 332 U. S. 46, 71-72 (1947) (dissenting opinion); *Griffin* v. *California,* 380 U. S. 609 (1965), or the Fourteenth Amendment includes the "fundamental" portions of the Sixth, *Gideon* v. *Wainwright,* 372 U. S. 335, 342 (1963) or incorporates a concept of "ordered liberty" distinct from the specific guarantees of the Bill of Rights, see *Pointer* v. *Texas,* 380 U. S. 400, 408 (1965) (concurring opinion), state prosecutions must meet the constitutional guarantee of fair trial. *Cox* v. *Louisiana,* 379 U. S. 559, 562 (1965); *Jackson* v. *Denno,* 378 U. S. 368, 377 (1964).

[35] *Marshall* v. *United States,* 360 U. S. 310 (1959); *Janko* v. *United States,* 366 U. S. 716 (1961).

[36] *Irvin* v. *Dowd,* 366 U. S. 717 (1961); *Rideau* v. *Louisiana,* 373 U. S. 723 (1963); *Estes* v. *Texas,* 381 U. S. 532 (1965). Cf. *Shepherd* v. *Florida,* 341 U. S. 50 (1951) (concurring opinion); *Stroble* v. *California,* 343 U. S. 181 (1952).

[37] *Estes* v. *Texas,* 381 U. S. 532, 578 (1965) (concurring opinion).

[38] E.g., *Irvin* v. *Dowd,* 366 U. S. 717, 728 (1961): "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father."

quired a showing of actual prejudice to the defendant before reversing a conviction on the ground that inflammatory publicity had contaminated the trial.[39] In subsequent cases, however, "the Court departed from the approach it charted in *Stroble* v. *California*" [40] and reversals were accomplished without such a showing upon the ground that prejudice was inherent in the trial and pre-trial publicity.[41]

This latter approach to the protection of due process of law has a long and honorable history in this Court.

In *Tumey* v. *Ohio*, 273 U. S. 510, 532 (1927), Chief Justice Taft said:

> "Every procedure which would offer a *possible* temptation to the average man * * * to forget the burden of proof required to convict * * * or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." (Emphasis supplied.)[42]

In *In re Murchison*, 349 U. S. 133, 136 (1955), Mr. Justice Black, speaking for the Court, said:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. *But our system of law*

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[39] *Stroble* v. *California*, 343 U. S. 181 (1952); *Irvin* v. *Dowd*, 366 U. S. 717 (1961).

[40] *Estes* v. *Texas*, 381 U. S. 532, 543 (1965).

[41] *Rideau* v. *Louisiana*, 373 U. S. 723 (1963); *Estes* v. *Texas*, 381 U. S. 532 (1965). *Accord*: *Turner* v. *Louisiana*, 379 U. S. 466 (1965); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *White* v. *Maryland*, 373 U. S. 59 (1963).

[42] Quoted with approval in *Estes* v. *Texas*, 381 U. S. 532, 543 (1965).

> *has always endeavored to prevent even the probability of unfairness.* • • • [T]o perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v. *United States*, 348 U. S. 11, 14." (Emphasis supplied.)[43]

The application of the principle that actual prejudice need not be shown where the circumstances are inherently suspect constitutionally is particularly appropriate in cases involving publicity-poisoned criminal trials. For where such trial contamination is charged, "one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced." [44]

In cases involving both published confessions[45] and damaging accusatory publicity,[46] this Court has reversed convictions because of the inherently unconstitutional circumstances and not upon a showing of actual prejudice.

The instant case turned upon these considerations in the court below. Although there has never been any material disagreement about the extent or nature of the damaging publicity which inundated the community in which petitioner stood trial for murder, either in the opinions affirming his conviction on direct appeal or those in the collateral proceeding presently before this Court, the majority of the Court of Appeals reversed the finding of the District Court that the newspaper publicity was inherently prejudicial. They held instead that the burden upon the petitioner of

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[43] *Ibid.*

[44] *Id.* at 544.

[45] *Rideau* v. *Louisiana*, 373 U. S. 723 (1963).

[46] *Estes* v. *Texas*, 381 U. S. 532 (1965).

demonstrating the constitutional invalidity of his conviction was "one which must be carried 'not as a matter of speculation but as a demonstrable reality'," upon the authority, *inter alia*, of *Stroble* v. *California*, 343 U. S. 181 (1952),[47] and that petitioner had not met that burden.

In seeking reversal of the decision of the Court of Appeals, *amici* do not claim that all criminal trials conducted in the context of massive publicity are, without proof of actual prejudice, violative of the constitutional command that each accused is entitled to a fair trial by an impartial judge and jury. Rather, *amici* urge this Court to continue on the course it has charted in *Rideau* and *Estes* and rule that certain specific types and varieties of pretrial and trial publicity,[48] all present in quantity and intensity in the case at bar, are inherently prejudicial to the accused, because they necessarily deny him a fair trial by both judge and jury.[49]

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[47] S. 8. This ruling was made despite the implications of *Rideau* v. *Louisiana*, 373 U. S. 723 (1963) and persisted upon application for rehearing after *Estes* v. *Texas* had made it clear that this Court had departed from the *Stroble* approach. 381 U. S. 532 (1965). S. 111-113.

[48] Because the jury was not sequestered in the instant case, but had the opportunity to view and hear the publicity disseminated during trial, both pretrial and trial publicity will be considered together.

[49] Throughout this brief it is presumed that the evil in inflammatory and oppressive news reporting and comment about a highly-publicized crime and trial affects the impartiality of the *judge* as well as the *jury*. For "[t]o deny that bludgeoning or poisonous comment has power to influence or at least to disturb the task of judging is to play make believe and to assume that men in gowns are angels. The psychological aspects of this problem become particularly pertinent in the case of elected judges with short tenure." *Pennekamp* v. *Florida*, 328 U. S. 331, 359

These varieties of publicity include:

I. Damaging publicity procured or cooperated in by state law enforcement authorities.

II. Damaging publicity relating to prospective testimony of prosecution witnesses not actually offered at the trial by the prosecution.

III. Damaging publicity describing evidence which, if offered by the prosecution at trial, would have been inadmissible and constitutionally prejudicial.

IV. Publicity which makes well-known personalities of the trial jurors.

V. Damaging publicity of an accusatory nature, whether or not participated in by law enforcement authorities, which charges guilt or attacks the character or reputation of the accused.

Each of these matters will be considered in sequence below.[50]

(1946) (concurring opinion). In the instant case, the fact that the trial judge stood for re-election in the middle of the trial, with the political support of the local newspaper which had crusaded vigorously to have petitioner arrested and convicted of murder, needs no further embellishment. See S. 101.

[50] There is no question here about the requisite "state action" to permit this Court to find a federal constitutional violation in each of the varieties of pretrial and trial publicity described above. In (I) the prosecution's active creation of the publicity demonstrates the necessary state action. *Mooney* v. *Holohan*, 294 U. S. 103 (1935). In (II), (III), (IV), and (V), it must be underscored that the constitutional impediment to a trial conducted in the midst of such publicity lies not in the fact that *the independent press published the material in question*, but rather *because the trial court failed to protect the impartiality*

I.

Damaging publicity induced by law enforcement authorities.

There can be no question but that the police, the county prosecutor, the county coroner and other law enforcement officials were the cooperative sources, if not the immediate cause of much of the inflammatory publicity in the news media of which petitioner complains. Quotations from policemen and detectives concerning their opinions as to petitioner's guilt and lack of character,[51] police threats to interrogate him as a suspect without his attorney present,[52] assertions by the prosecution's medical expert that petitioner's claimed injuries had been falsified,[53] publication of "mug shots" of petitioner which could only have come from official jail records,[54] published conclusions of the police and prosecutors that they had "convicting evidence" of petitioner's guilt,[55] and predictions of a "bombshell witness" (with a detailed description of his prospective direct testimony) to be produced at the trial by the prosecution[56]

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of the tribunal by granting the continuances, change of venue or mistrial repeatedly sought by defense counsel.

The argument that such matters are within the sound discretion of the trial court is hopelessly irrelevant because the judge was required to make his discretionary rulings at a time when he was as subject to the prejudicial atmosphere created by the press as was the jury. See discussion in footnote 49, *supra*.

[51] E.g., S. 110, S. 126, 56a.

[52] 54a. Cf. *Escobedo* v. *Illinois*, 378 U. S. 478 (1964).

[53] 54a-55a.

[54] E.g., S. 125.

[55] 60a-61a.

[56] E.g., S. 127.

(but who ultimately never testified in court) are illustrative examples. One police captain even urged petitioner's arrest for murder in a public statement from Miami where he had been vacationing, thousands of miles from the scene of the local investigation.[57]

It seems clear enough that

> "To have the prosecutor himself feed the press with evidence that no self-restrained press ought to publish in anticipation of a trial is to make the State itself through the prosecutor, who wields its power, a conscious participant in trial by newspaper, instead of by those methods which centuries of experience have shown to be indispensable to the fair administration of justice." [58]

That such conduct on the part of law enforcement authorities is prevalent in most highly-publicized trials, either to obtain a climate of community opinion in which conviction is likely or to accommodate the press because of weakness or the hope of political favor, cannot seriously be doubted.[59]

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[57] 56a.

[58] *Stroble* v. *California*, 343 U. S. 181, 201 (1952) (dissenting opinion).

[59] E.g., *Stroble* v. *California*, 343 U. S. 181 (1952) (prosecutor released confession to press even before defendant had completed his statement); *Shepherd* v. *Florida*, 341 U. S. 50 (1951) (newspapers published confession of defendant and attributed information to sheriff; confession never offered at trial); *Irvin* v. *Dowd*, 366 U. S. 717 (1961) (prosecutor and police officials issued intensively publicized press releases stating that petitioner had confessed to six murders); *Rideau* v. *Louisiana*, 373 U. S. 723 (1963) (accused interviewed in jail by sheriff for television). And see official account of opinion-molding and toadying to news media pressure by Dallas law enforcement authorities in the *Report of The President's Commission on the Assassination of President John F. Kennedy (1964)*, pp. 231-242.

The need, so far as criminal due process is concerned, is compelling and urgent. It remains for this Court to announce a rule of conduct for law enforcement authorities which will make costly their participation in trial by newspaper. Reversal of convictions where unconstitutional conduct by law enforcement authorities pervaded the proceedings has been used effectively by this Court as a deterrent to such conduct.[60] A presumption of inherent unconstitutionality in a highly publicized trial where law enforcement authorities actively participated in the inflammatory press releases would assist materially in eliminating the practice of "anticipatory trial by newspapers"[61] which currently impairs our administration of criminal justice.

II.

Damaging publicity describing prosecution evidence which varies materially from that introduced at trial by the prosecution.

The record in the instant case is replete with prosecution evidence offered to the community by the news media but which never was offered in the actual trial. Charges by a police captain in command of the Cleveland police homicide bureau that petitioner was a "bare faced liar" in his sworn

[60] E.g., *Mapp* v. *Ohio*, 367 U. S. 643 (1961) (evidence obtained by illegal search and seizure); *Beck* v. *Ohio*, 379 U. S. 89 (1964) (unlawful arrest); *Griffin* v. *California*, 380 U. S. 609 (1965) (comment by prosecutor on failure of defendant to testify); and see *Mooney* v. *Holohan*, 294 U. S. 103 (1935); *Alcorta* v. *Texas*, 355 U. S. 28 (1957); *Napue* v. *Illinois*, 360 U. S. 264 (1959); *Brady* v. *Maryland*, 373 U. S. 83 (1963).

[61] *Irvin* v. *Dowd*, 366 U. S. 717, 729 (1961) (concurring opinion).

testimony[62] (although he never appeared as a rebuttal witness for the state at the trial), and newspaper revelation of the direct testimony of a prospective prosecution "bombshell witness" (who never testified in court)[63] are but two colorful examples.

This case bears witness to the wry comment of Mr. Justice Frankfurter, concurring in *Pennekamp* v. *Florida*, 328 U. S. 331, 362 (1946):

> "Cases are too often tried in newspapers before they are tried in court, and the cast of characters in the newspaper trial too often differs greatly from the real persons who appear at the trial in court and who may have to suffer its distorted consequences."

Quite apart from the question of the active participation of the police and prosecutor in the dissemination of such matter to the community at large,[64] the danger to due process of law caused by such publication is evident.

As Mr. Justice Jackson, concurring in *Shepherd* v. *Florida*, 341 U. S. 50, 52 (1951), has pointed out:

> "When such events take place in the courtroom, defendant's counsel can meet them with evidence, arguments, and requests for instructions and can at least preserve his objections on the record.
>
> "But neither counsel nor court can control the admission of evidence if unproven, and probably unprovable [evidence is] put before the jury by news-

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[62] S. 110, 47a.

[63] S. 109, 44a-45a.

[64] Discussed *supra*, pp. 17-19.

papers and radio. Rights of the defendant to be confronted by witnesses against him and to cross-examine them are thereby circumvented. * * *" (Bracketed material supplied.)

The prejudice to the defendant from such unoffered testimony in the news media is infinitely greater than if the same evidence were offered in court with appropriate due process safeguards. "[T]he propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied." [65]

Under such circumstances, a presumption of prejudice to the accused is as clearly justifiable as though the evidence were offered in court without affording the defendant the opportunity to object to its introduction, make a record for appeal, confront witnesses, cross-examine, or subpoena additional witnesses to rebut such evidence.

The violence to due process is patent.

III.

Damaging publicity describing prosecution evidence which would be inadmissible in court.

Closely allied to the prejudicial effect of prosecution witnesses whose direct testimony was communicated by the news media to the public, but who never appeared in court to subject themselves to cross-examination, is the dissemination of evidence which clearly cannot be offered in court because, by its very nature, it is prejudicially inadmissible.

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[65] *Patterson* v. *Colorado*, 205 U. S. 454, 463 (1907).

Such material abounds in the case at bar. For example, the publication of petitioner's pretrial refusal to subject himself either to "lie detector" or "truth serum" tests by the police, coupled with the editorial suggestion that such suspicious conduct was indicative of his guilt[66] undoubtedly did incalculable damage to petitioner's credibility, which, it must be noted, was the principal question presented to the jury.

Whether or not the evidence would have been inadmissible in court because of the well-known unreliability of "lie detectors" and "truth serum,"[67] or for the constitutional reasons that comment upon such refusal would invade (a) his Fifth Amendment privilege to refuse to testify against himself[68] or (b) his Sixth Amendment right to have his guilt or innocence determined by an impartial tribunal rather than by such "scientific" substitutes,[69] it is clear that the entire question was mooted by the pretrial publication of such prejudicial matters, before defense counsel had an opportunity to object to its introduction in court. The tactical dilemma in which petitioner's trial counsel found himself as a result of such prejudicial pretrial publicity is well illustrated by his compelled failure to object to the introduction of such damaging evidence in court—evidence which was well known to the entire community already and which he would only have re-emphasized by objecting—and

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[66] S. 119, 120, 10a, 12a, 13a, 21a, 37a, 54a.

[67] *Ohio* v. *Smith*, 113 Ohio App. 461, 462-3 (Lucas 1960); *Parker* v. *Friendt*, 99 Ohio App. 329, 335-338 (Cuyahoga 1954); *Freeman* v. *New York Central R. R. Co.*, 15 Ohio Op. 2d 187, 190 (App. Lucas 1960) and see Annotation, 23 ALR 2d 1308 for collected cases.

[68] See *Griffin* v. *California*, 380 U. S. 609 (1965).

[69] *Ohio* v. *Smith*, 113 Ohio App. 461, 463 (Lucas 1960).

the subsequent determination by the Court of Appeals that the constitutional question had been waived by his conduct.[70]

It must be emphasized that the claim of constitutional infirmity made by *amici* here is not that the lie detector and truth serum testimony was admitted into evidence (a question which the Court of Appeals determined had been waived by the conduct of defense counsel), but rather, that the pretrial publication of such evidence was so inherently prejudicial that defense counsel's timely motions for continuance, change of venue, and later, mistrial, should have been granted by the trial court as a constitutional necessity.

IV.

Publicity which makes celebrities of the trial jurors.

There can be little doubt that the jurors who sat as the trier of fact in the instant case became well-known in the community in which the trial took place as a result of the spotlight of publicity focused upon them by their selection as talesmen. The court permitted them to be photographed by press photographers in the courtroom and the jury room, prominent display of the photographs, names and addresses of the jurors appeared frequently on the front pages of the press[71] and feature articles about them, their dress, their families and their deliberations appeared in the news media with sufficient frequency to remove the jurors from the obscurity they had known before their associa-

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[70] S. 47.

[71] S. 103, 105.

tion with this case and add color to the community pageant which was petitioner's murder trial.[72]

Since the jury was not sequestered, it may be presumed that the jurors were aware of the treatment accorded them by the news media during the trial.

This Court has most recently had occasion to examine the psychological impact of intense publicity upon the jurors in *Estes* v. *Texas*.[73] While the issue presented there involved televising trial proceedings, many of the same considerations apply to the case at bar.

"Where pretrial publicity of all kinds has created intense public feeling which is aggravated by" intense publicity focused on the jury, "the nerve center of the fact-finding process," those jurors "cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them. If the community be hostile to an accused" a juror, "realizing that he must return to neighbors who saw" or read detailed accounts of "the trial themselves, may well be led 'not to hold the balance nice, clear and true between the State and the accused • • • '."

"Moreover, they would be subjected to the broadest commentary and criticism and perhaps the well-meant advice of friends, relatives and inquiring strangers who recognized them on the streets."[74]

If our jury system is to continue to have meaning, jurors must retain the anonymity which permits them to function best as representatives of their community in performing

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[72] S. 106, 107, 108, 128.

[73] 381 U. S. 532 (1965).

[74] *Id.* at 545-46.

the delicate task of fact-finding. When this fragile balance has been upset by the communications media, the Sixth and Fourteenth Amendment guarantee of a fair trial by an impartial jury becomes meaningless.

V.

Accusatory publicity which charges guilt or attacks the character or reputation of the accused.

One fact jumps from the pages of the voluminous record in the case at bar with astonishing clarity. Seldom has such a zealous journalistic campaign been waged, first to arrest, and then to convict, an accused. Some of the varieties of trial by newspaper have already been chronicled above. Using only the language of the majority of the court below which found *no* constitutional infirmity in the trial and pretrial proceedings, the journalistic product has been alternately described as "shameful journalism," "certainly not conducive to the judiciary's continuing concern for the freedom that the press insists should at all times be accorded to it," [75] "violent and colorful language," [76] "not of a nature calculated to inspire confidence in the objectivity and good taste of the public news media," [77] "shabby reporting" [78] and "flamboyant and sometimes shabby pre-trial exhibitions of the press." [79]

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[75] S. 5.

[76] S. 14.

[77] S. 23.

[78] S. 23.

[79] S. 32.

It may well be that newspapers may be expected to perform no more nobly than they did in the early days of our country.[80] But the technological improvements in the communications media in the past two hundred years make similar excesses exceedingly more dangerous to due process of law and the administration of criminal justice than did the limited technology of former times.

The fact which isolates the pretrial and trial publicity in the instant case from that in many other highly-publicized criminal trials, however, is the single-minded attempt by the news media to convict petitioner of the murder of his wife. By the use of slashing editorials,[81] biting cartoons,[82] maudlin feature stories[83] and slanted news articles,[84] both before and during the trial, petitioner was continually accused of the murder of his wife, lying to the police, inhibiting the criminal investigation, and using his social position and friends in high places to conceal his dirty work. The victim was characterized as a devoted mother and dutiful wife, while petitioner was portrayed as a selfish philanderer who indulged himself in extravagant purchases while denying his wife necessities.[85]

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[80] See letters of Thomas Jefferson as set out in Padover, Democracy, 150-151, reported in *Bridges* v. *California*, 314 U. S. 252, 270, fn. 16 (1941): "I deplore * * * the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them. * * * These ordures are rapidly depraving the public taste."

[81] S. 115, S. 116, S. 117, S. 118, S. 119, S. 120, S. 121, S. 123, S. 124.

[82] S. 122, S. 129.

[83] S. 126.

[84] S. 125, S. 127.

[85] 60a.

During the trial, radio broadcaster Robert Considine stated on a network program that petitioner's denial of guilt reminded him of the denials of Alger Hiss when Hiss was convicted of perjury,[86] and Walter Winchell, also on a network radio broadcast, proclaimed that a girl in New York then under arrest for armed robbery had revealed that petitioner was the father of her illegitimate child.[87]

Despite our nation's cultural and historic dedication to the First Amendment principle of freedom of expression, by word and in print, the news media must be reminded of the awful power which is theirs; they must come to understand that "a trial is not a 'free trade in ideas' nor is the best test of truth in a courtroom 'the power of the thought to get itself accepted in the competition of the market,'" [88] that "legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." [89]

This Court should hold that accusatory publicity which charges the defendant with guilt and attacks his character is inherently prejudicial, a denial of due process of law, and will require reversal of any subsequent conviction. Such a ruling would impress the news media, voluntarily and without judicial compulsion, to recognize their responsibilities toward the courts which protect their freedoms; further, it would serve as a warning to those who have a stake in preserving convictions obtained in the trial courts, that cynical use of the freedom of the press as a weapon to obtain a conviction will not be tolerated.

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[86] R. 3723.

[87] R. 5427.

[88] *Bridges* v. *California*, 314 U. S. 252, 283 (1941) (concurring opinion).

[89] *Id.*, at 271.

CONCLUSION

Amici have urged the constitutional invalidity of the conviction of the petitioner because the trial court failed to protect the accused from the inherently prejudicial publicity which saturated the community in which he stood trial. For this reason, *amici* urge this Court to reverse the decision of the Sixth Circuit Court of Appeals and grant the petitioner's application for a writ of habeas corpus. In doing so, this Court will have the opportunity to correct at last an egregious denial of criminal due process and, at the same time, provide working solutions for some of the difficult and delicate problems of free press and fair trial which currently beset the administration of criminal justice.

Respectfully submitted,

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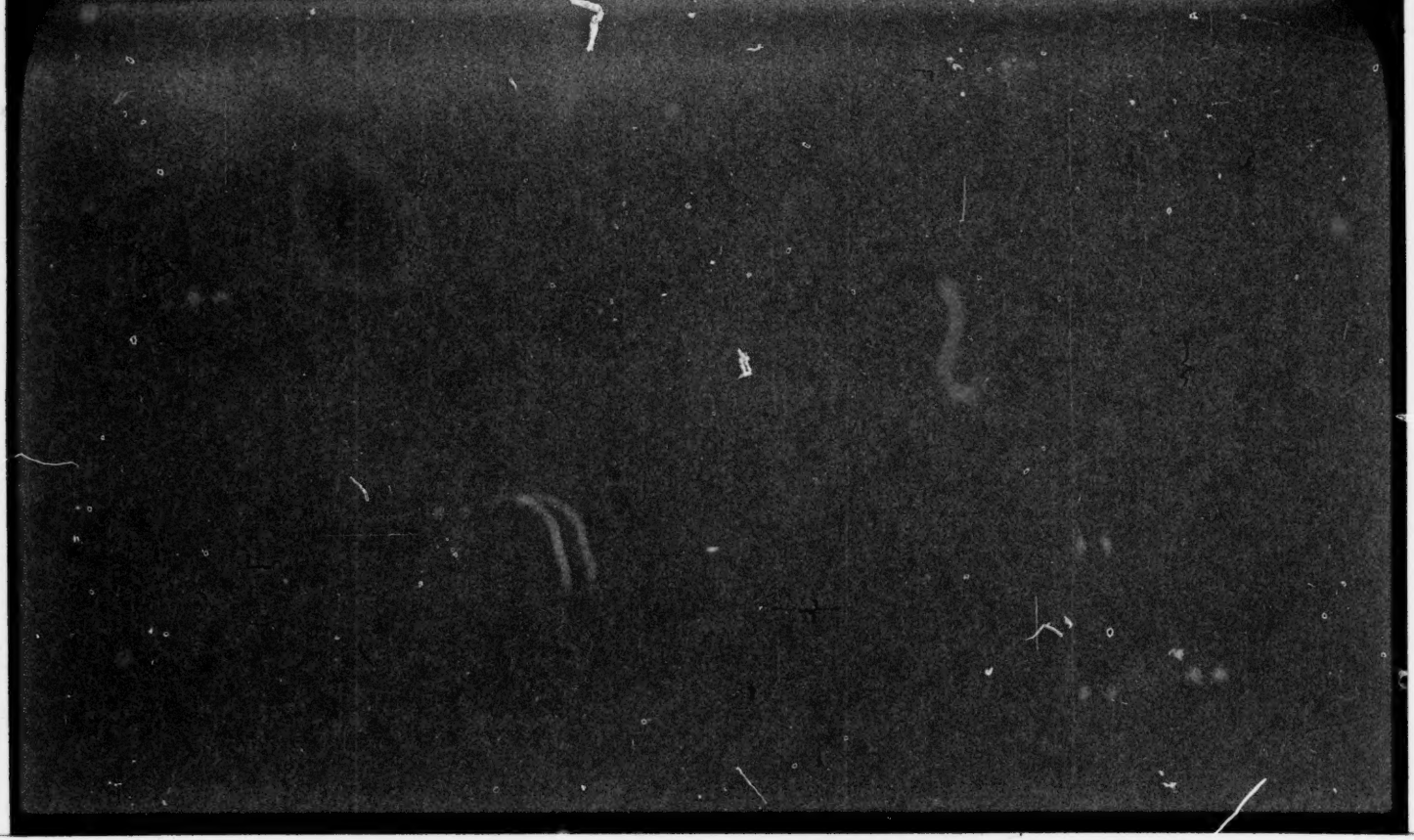
APPENDIX



APPENDIX

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil No. 6640. Decided July 15, 1964

SHEPPARD,

Petitioner,

—v.—

MAXWELL, WARDEN, ET,

*Respondent.**

WEINMAN, CHIEF JUDGE. This matter is before the Court upon a petition for a writ of habeas corpus filed against the Warden of The Ohio State Penitentiary in Columbus, Ohio, where petitioner is incarcerated pursuant to a judgment of the Court of Common Pleas of Cuyahoga County, Ohio, upon a conviction of murder in the second degree.

When the Court took this matter under advisement, a pretrial conference was held to discuss the procedures to be followed in presenting the issues in the case. The purpose of that conference, and similar ones which followed, was to expedite the case in its preparation and presentation for final determination. As a result of the first conference, it was agreed that all preliminary proceedings would be by pre-

* Only excerpts from the opinion of the court related to trial and pretrial publicity are reprinted here. The opinion in full may be found at 231 F. Supp. 37 (S. D. Ohio 1964).

trial orders; those orders to be by agreement of counsel and/or by order of the Court.

One of the pre-trial orders agreed upon and filed by counsel for the parties sets forth the history of the case. That history, with the references to exhibits attached to the pre-trial order omitted, is as follows:

"Petitioner, Samuel H. Sheppard, was in July, 1954, a resident of Bay Village, Ohio, a suburb on the west side of Cleveland. He was a doctor of osteopathic medicine, specializing in Surgery, and a member of the staff of the Bay View Hospital. He was thirty years of age and was married to Marilyn Reese Sheppard, also thirty. They had been married for nine years and had one son, aged seven. Petitioner and his family lived in a house on the shore of Lake Erie, which house was owned by Marilyn. Petitioner was associated in the practice of medicine with his father and two older brothers, all doctors. He was in comfortable financial circumstances.

"On the night of July 3, 1954, petitioner and his wife entertained friends, Don and Nancy Ahearn, in their home. The Ahearns left at approximately 12:30 a. m., July 4, 1954; Marilyn saw them to the door, for petitioner was or appeared to be asleep on a couch in the living room. The evening had been a congenial one, and the Ahearns observed no indications of hostility between petitioner and his wife (who was pregnant) at any time during the evening. In fact, there were overt manifestations of affection between them.

"Shortly before 6:00 A. M. a telephone call was received from petitioner by J. Spencer Houk, mayor of Bay Village and a friend of petitioner. Houk lived two houses distant

from the home of petitioner. Houk heard petitioner say:

" 'My God, Spence, get over here quick, I think they have killed Marilyn.'

"Houk dressed and with his wife, Esther, drove within a short time the few hundred feet to petitioner's home. Upon arrival the Houks found petitioner on the first floor of the house. His face showed some injury, and he complained of pain in his neck. Esther Houk went up to the bedroom, at the suggestion of petitioner, to check on the condition of Marilyn Sheppard. She found Marilyn lying in a pool of blood on the bed. She was dead. The room was covered with splattered blood. It was determined that she had suffered some thirty-five blows about the head by some blunt instrument, causing death. There was some conflict as to how long she had been dead when discovered by the Houks.

"The story given by petitioner to police and at the trial, was substantially as follows: As he was sleeping on the couch, he was awakened by a noise coming from the second floor. He thought he heard his name called. He went up the stairs, which was dimly lit by a light in the hall. He recognized only a white 'form' standing next to the bed where his wife slept. He grappled with the form, and was struck on the back of the neck which rendered him unconscious. Before losing consciousness petitioner heard loud moans, as if from someone injured. When petitioner recovered consciousness, he examined his wife, found or thought that she was dead, determined that his son (in an adjacent room) had not been harmed, and then, hearing noise of some sort on the first floor, ran down. He saw a form running out the door of the house nearest to Lake

Erie, and pursued it to the shore. There he struggled again, and again lost consciousness. When he came to, he went back to the house, re-examined his wife, and called Mayor Houk. Petitioner was unable to establish (1) the number of people in the bedroom at the time of the first encounter or the time of said encounter; (2) the duration of his unconsciousness on either occasion, or (3) the sex or identity of any of the single or several assailants he encountered. He stated that his perceptions had been vague because he was asleep at the outset of the chain of events, and unconscious twice as it progressed.

"In the course of interrogations by police and the County Coroner, petitioner was asked if he had had sexual relations with one Susan Hayes, an ex-employee of the hospital, in March, 1954, in Los Angeles. Petitioner denied this, but later admitted it when confronted with her statement of the affair. The state contended that Miss Hayes was the motive for a premeditated murder, but the jury returned a verdict of murder in the second degree.

"The murder of Marilyn Sheppard captivated the attention of news media in an unprecedented manner. Editorials on the first page of a leading Cleveland newspaper, and news media generally, set up a hue and cry for a solution to the crime. An inquest was demanded and held, and petitioner's arrest was suggested most strongly by at least one leading newspaper. On July 30, 1954, petitioner was arrested; he was admitted to bail, and indicted a few days later, on August 17, 1954. He has been in custody ever since.

"The trial began on October 18, 1954, and on December 17 of the same year the cause was submitted to a jury in

the Court of Common Pleas of Cuyahoga County. On December 21st the verdict of guilty of murder in the second degree was returned, and petitioner was sentenced to life imprisonment in the state penitentiary at Columbus, Ohio, where he is now detained in the custody of respondent.

"The details of the trial, which fill over seven thousand pages in the bill of exceptions, are not recited here; it is the understanding of counsel for both sides that it was not the purpose of this history to describe the voluminous evidence.

"On January 3, 1955, the trial court overruled a motion for new trial which had been based on numerous assignments of error occurring during trial and deliberation * * *.

"On May 9, 1955, the trial court denied a supplemental motion for new trial on ground of newly discovered evidence and based upon the affidavit of Paul Leland Kirk, a criminologist, who claimed to have demonstrated that blood tests made in the murder room proved the existence of blood which did not come from the defendant or the deceased. This evidence was not obtained until after the verdict had been returned.

"On July 20, 1955,[1] the Court of Appeals of Cuyahoga County affirmed the conviction of petitioner; and on July 25, 1955 the same Court affirmed the denial of the second motion for new trial * * *.

"On May 31, 1956, the Ohio Supreme Court affirmed the action of the Court of Appeals as to the case in chief, but did not discuss or pass upon the alleged newly discovered evidence. Two Judges dissented, expressing the view that Sheppard should be accorded a new trial * * *.

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[1] It is a minor point, but the Court notes that several of the dates of decisions are incorrectly stated.

"On November 14, 1956, the Supreme Court of the United States denied a petition for certiorari; application for rehearing was denied on December 19, 1956 • • •.

"On September 5, 1960, Chief Justice Weygandt denied an application for a writ of habeas corpus in the Ohio Supreme Court; the petition therefore was dismissed on May 5, 1961.

"On April 11th, 1963, petitioner filed a petition for a writ of habeas corpus in this Court, which is the action giving rise to this order.

"Petitioner, Samuel H. Sheppard, has at all times maintained that he was not guilty of the murder of his wife, and that he knew no more about said death than he told at the trial."

• • • • •

(1) *Was the publicity before trial and/or during trial such that it violated petitioner's constitutional rights?* (issues numbered 3, 4, 5, 6, 7 and 8). With regard to this issue, counsel have submitted into evidence, by agreement, the following documents, materials and stipulated facts:

1. A copy of the petition for a writ of certiorari to the United States Supreme Court, *Sheppard* v. *Ohio,* Number 352, October Term, 1956, and the Appendix to that petition. There was, of course, no stipulation as to the accuracy, factual or legal, of the allegations and arguments contained in the petition. However, it was agreed that the exhibits reproduced in the Appendix accurately portrayed the documents and materials which they purported to represent.

2. Pages 3723 to 3725, pages 4266 to 4268 and pages 5427 to 5430 of the Bill of Exceptions.

3. Five volumes of green covered scrap books of news clippings from the Cleveland Press, the Cleveland News (which has since merged with the Cleveland Press) and the Cleveland Plain Dealer. These scrap books contain substantially all of the clippings relating to the Sheppard case which were published by these three newspapers during the period from July 1954 through December 1954.

4. The fact that there was published in all three Cleveland newspapers previously referred to, and particularly on September 23, 1954, 25 days before the selection of a jury began, a list of 75 veniremen who had been drawn as prospective jurors in the Sheppard case, giving the full name and street address of each juror listed.

5. The fact that the 13 petit jurors who heard the evidence and decided petitioner's case were allowed to go to their homes each night during the trial, and were not sequestered or kept apart until after the court's charge, at which time the jury was committed to the custody of two bailiffs and were thereafter kept under constant guard and supervision during their deliberations and until their verdict had been returned in open court.

6. The fact that the trial judge, before the commencement of the trial, made certain arrangements with respect to the seating whereby a major portion of the courtroom where the case was to be tried was assigned to the news media.

Prior to commencement of trial, counsel for petitioner made a number of motions for change of venue or for continuance. The trial judge held these motions in abeyance until after the jury was selected; after which he overruled each of the motions.

Newspaper publicity before trial. The first question to be considered is whether the trial judge erred in overruling the aforesaid motions and proceeding with trial in view of the newspaper publicity before trial. It would be impractical to quote each newspaper article which bears upon this question; therefore, the Court will set forth only those articles and headlines which it believes to be most relevant:

"STATE PREPARES CHARGE AGAINST BAY MURDERER"

"NEW SEARCH IS ORDERED FOR CLEWS"

" 'The state is already preparing its case against the killer of Mrs. Marilyn Sheppard.'

"This statement was made today by Assistant County Prosecutor John J. Mahon as he directed a surprise new search of the Bay Village home in which the 30-year-old clubwoman was beaten to death Sunday morning.

"Mahon sharply criticized the refusal of relatives to permit the immediate questioning of the victim's husband, Dr. Samuel Sheppard, also 30.

"While the prosecutor spoke, Dr. Sheppard, his injured neck supported by a brace, was being taken out of Bay View Hospital in a wheelchair to attend his wife's funeral * * *."

Cleveland Press, July 7, 1954, p. 1.

"TESTIFY NOW IN DEATH, BAY DOCTOR IS ORDERED"

"A forthwith subpena commanding Dr. Sam Sheppard, husband of the clain [sic] Bay Village woman, to appear at the county prosecutor's office for questioning was issued today.

"It was hastily issued by Coroner Samuel R. Gerber following a session at the doctor's bedside in Bay View Hospital.

"Deputy Sheriff Carl Rossbach entered the injured osteopath's room in the hospital which is operated by his family, in an effort to question him about the events leading to his wife's death.

"William J. Corrigan, Cleveland criminal defense attorney retained by Dr. Sheppard's family, went in, too.

"A few minutes later, Rossbach stalked out and reported to Coroner Gerber.

"Dr. Gerber angrily wrote out the subpena and handed it to Rossbach. 'Serve it forthwith,' he commanded.

"Rossbach went back into the room to attempt to resume the interrogation.

"The dramatic development came immediately after Assistant County Prosecutor John J. Mahon took control of the murder investigation and issued an abrupt ultimatum:

"Dr. Sheppard must come downtown to the prosecutor's office 'voluntarily to make a statement concerning the crime.'

"If the osteopath refuses, Mahon said, a coroner's inquest will be convened at the Morgue immediately, and Dr. Sheppard will be subpenaed and compelled to testify.

Opinion of the District Court

". . . These developments came as Dr. Stephen Sheppard brother-in-law of the clain [sic] clubwoman, told reporters that his brother was eager and anxious to aid the investigation and was now physically able to withstand questioning.

"He added that William J. Corrigan, prominent Cleveland criminal defense lawyer retained by the family, was 'in complete charge from now on.'

" • • •

" 'In my twenty-three years of criminal prosecution, I have never seen such flagrant stalling as in this case by the family of Dr. Samuel Sheppard,' Mahon said.

" • • • ."

Cleveland Press, July 8, 1954, p. 1.

"DOCTOR RE-ENACTS STORY OF MURDER; REJECTS LIE TEST"

"Doctor Samuel H. Sheppard declined to submit to a lie detector test for questioning about the slaying of his attractive wife, it was disclosed today • • • ."

Cleveland News, July 9, 1954, p. 1.

"DOCTOR RE-ENACTS TRAGEDY"

"HE BARS LIE TEST FOR PRESENT"

"Flanked by two attorneys Dr. Samuel H. Sheppard today re-enacted his version of the murder of his pretty wife, Marilyn—and repeated it, detail by detail, word for word, over and over again.

"Earlier he had refused for the second time to take a lie detector test in 'my present emotional state.'

" • • • ."

Cleveland Press, July 9, 1954, p. 1.

"TOO MUCH TIME LOST"

"Within memory no murder case in this part of the country has prompted so much discussion or speculation as that of Mrs. Sheppard.

"A good part of it centers quite naturally around the circumstances of the killing itself—in a quiet suburban setting —and its attendant mysterious elements.

"A good part likewise centers around the protective ring set up by members of the Sheppard family, which in some respects has tended to add to rather subtract from the speculation that has expanded the case to such vast proportions.

"Also the apparent fumbling of investigative authorities on both the municipal and county levels has added to the intensity of interest—and has raised many additional questions.

"Any time a factor of special attention, or privilege, or special protection is introduced into any case it is bound to produce increased and critical attention.

"In the Sheppard murder case many of these factors are present against the original background of mystery, and it is therefore not unnatural that it occupies such intense and critical notice around the whole community.

"But the principal problem is the fact, that, for whatever reasons, the investigative authorities were slow in getting started, fumbling when they did, awkward in breaking through the protective barriers of the family, and far less aggressive than they should have been in following out clews, tracks, and evidence.

"There is nothing that helps block a solution to a murder more than a cold trail, and it is this, as much as anything, that causes such wide critical appraisal of the Sheppard case.

"Now that the investigative authorities appear finally to have catalyzed themselves into action and broken through some of the protective barriers, they ought to make up in redoubled effort the time they have already lost."

Cleveland Press, July 9, 1954, p. 14.

"QUIZ DOCTOR FOR 7 HOURS"

"• • •

"Deputy Sheriff Carl Rossbach renewed his demand that the 30-year old osteopath submit to a lie detector test.

"'He doesn't have to if he doesn't want to,' Rossbach said, 'but I intend to keep on asking until he agrees.'

"• • • ."

Cleveland Press, July 10, 1954, p. 1.

"DOCTOR CALLS SECOND LIE TEST REFUSAL FINAL'

"• • •

"Dr. Samuel H. Sheppard again late yesterday refused to take a lie detector test in the investigation of the brutal murder of his pretty wife, Marilyn.

"Assistant County Prosecutor Thomas J. Parrino told reporters at the end of a nine-hour questioning of Dr. Sheppard: 'I felt that he was now ruling it out completely.'

"• • • ."

Cleveland Plain Dealer, July 11, 1954, p. 1

"PUSHES FOR SHEPPARD LIE TEST"

"DOCTOR IS WELL ENOUGH NOW, GERBER SAYS"

"Still on the trail of the elusive motive for the murder of Mrs. Marilyn Sheppard 10 days ago, investigators today concentrated on a possible 'other woman' angle.

"AT THE SAME TIME, CORONER SAMUEL R. GERBER AGAIN URGED THE SLAIN WOMAN'S HUSBAND, DR. SAMUEL H. SHEPPARD, BAY VILLAGE OSTEOPATH, TO SUBMIT TO A LIE DETECTOR TEST.

" 'If Dr. Sheppard has recovered sufficiently to go back to work at the Bay View Hospital he is well enough to take a lie detector test,' Dr. Gerber said.

" • • • • "

Cleveland News, July 13, 1954, p. 1.

"PAINESVILLE WOMAN'S STORY OPENS NEW SHEPPARD QUIZ"

"SAYS DOCTOR'S WIFE WANTED TO GET DIVORCE"

"A Painesville woman late today sent police off at a new tangent in their search for the mysterious slayer of Mrs. Marilyn Sheppard.

"THE NEW WITNESS IN THE MURDER CASE WAS MRS. JESSIE DILL, 23, MOTHER OF TWO CHILDREN. SHE WAS QUESTIONED IN THE PAINESVILLE POLICE STATION FOR TWO HOURS BY BAY VILLAGE POLICE.

"Mrs. Dill told reporters she had met a woman she is positive was Marilyn Sheppard on the beach at Fairport Harbor Monday, June 14.

"'She seemed to be unhappy and asked me where my husband was,' Mrs. Dill said. 'I told her I was divorced and she said "that's what I ought to do." She said she had attempted to divorce her husband in California four years ago but his relatives had talked her out of it.'

"Mrs. Dill gave police and reporters the name of a man mentioned by the woman she identified as Mrs. Sheppard. The man had not previously entered the murder investigation.

"Mrs. Dill said the women [sic] she identified as Mrs. Sheppard told her she was to have a baby, and she was afraid if she divorced her husband her 7-year-old son, Chip, would be taken away from her.

"• • • •"

Cleveland News, July 15, 1954, p. 1.

"THE FINGER OF SUSPICION"

"The worst thing about the tragic mishandling of the Sheppard murder investigation is the resulting suspicion.

"Why was it mishandled, people ask.

"You can't blame them.

"In this community generally, murder investigations are conducted with intelligence, efficiency and impartiality.

"The record is good.

"The detectives on the Homicide Squad in the Cleveland

Police Department, for instance, know their job. They have a national reputation.

"Same with the coroner.

"Thanks to his close co-operation with Western Reserve University, and thanks to the voters who authorized the best equipment and facilities, the county has top standing in the relatively new field of scientific crime investigation.

"And the sheriff's office and the prosecutor's office both have good reputations for integrity and determination in solving crimes.

"What happened, then?

"Two things stood in the way of the usual complete and unfettered investigation that the citizens of Greater Cleveland have come to expect as the natural course of events.

"ONE was the hostility of Bay Village officials to any 'outsiders' in this case.

"They rebuffed the usual assistance immediately offered by Cleveland police experts in solving murders.

"SECOND was the unusual protection set up around the husband of the victim, the sole witness, according to later reports, who could start the investigation on the right track.

"The protection was twofold. It came from his family and it came from his lawyer. It was unusual; to say the least.

"And then, worst of all, no law enforcement official, Bay or county, took any leadership in the face of these unusual circumstances.

"No one.

"The result of all this fumbling and delay, of course, was

to start gossip, to launch rumors, to spread suspicion thick as glue.

"It was bad for everybody. Everybody, that is, except the murderer.

"What can be done, now?

"It doesn't make much difference who runs the show. The important thing is that justice is done.

"First logical step would be a meeting of all the law enforcement agencies involved.

"Let them select a leader, a single responsible boss for this particular case.

"Let him serve notice that protection, special favors and fancy ultimatums by lawyers are out from here on.

"Maybe it's too late to start again.

"BUT EVERY FURTHER MOMENT OF FUMBLING IS HELPING A MURDERER ESCAPE."

Cleveland Press, July 16, 1954, p. 12.

"SHEPPARD SET FOR NEW QUIZ"
"GETTING AWAY WITH MURDER"
"AN EDITORIAL"

"What's the matter with the law enforcement authorities of Cuyahoga County?

"Have they lost their sense of reason?—or at least inexcusably set aside the realization of what they are hired to do, and for whom they work?

"If ever a murder case was studded with fumbling, halting, stupid, uncooperative bungling-politeness to people whose place in this situation completely justified vigorous

searching, prompt and effective police work—the Sheppard case has them all.

"Was the murder of Mrs. Sheppard a polite matter?

"Did the killer make a dutiful bow to the authorities and then proceed brutally to destroy the young child-bearing wife?

"Why all of this sham, hypocrisy, politeness, criss-crossing of pomp and protocol in this case?

"Who is trying to deceive whom?

"From the very beginning of this case—from the first hour that the murder became known to the authorities by a telephone call from the husband to the town mayor—from that moment on and including this, the case has been one of the worst in local crime history.

"Of course the trail is cold. Of course the clews have been virtually erased by the killer. Of course the whole thing is botched up so badly that head or tail cannot be made of it.

"In the background of this case are friendships, relationships, hired lawyers, a husband who ought to have been subjected instantly to the same third-degree to which any other person under similar circumstances is subjected, and a whole string of special and bewildering extra-privileged courtesies that should never be extended by authorities investigating a murder—the most serious, and sickening crime of all.

"The spectacle of a whole community watching a batch of law enforcement officials fumbling around, stumbling over one another, bowing and scraping in the presence of people they ought to be dealing with just as firmly as any

other persons in any other crime—that spectacle is not only becoming a stench but a serious threat to the dignity of law enforcement itself.

"Coroner Sam Gerber was never more right than when yesterday he said that the killer must be laughing secretly at the whole spectacle—the spectacle of a community of a million and a half people brought to indignant frustration by Mrs. Sheppard's killer in that white house out in Bay Village.

"Why shouldn't he chuckle? Why shouldn't he cover up, shut up, conceal himself behind the circle of protecting people?

"What's the matter with us in Cuyahoga County? Who are we afraid of? Why do we have to kow-tow to a set of circumstances and people where a murder has been committed?

"It's time that somebody smashed into this situation and tore aside this restraining curtain of sham, politeness and hypocrisy and went at the business of solving a murder—and quit this nonsense of artificial politeness that has not been extended to any other murder case in generations."

Cleveland Press, July 20, 1954, p. 1.

"ISN'T THIS MURDER WORTH AN INQUEST?"

And in a later edition, the same editorial was headlined:

"WHY NO INQUEST? DO IT NOW, DR. GERBER"

"AN EDITORIAL"

"Why hasn't County Coroner Sam Gerber called an inquest into the Sheppard murder case?

"What restrains him?

"Is the Sheppard murder case any different from the countless other murder mysteries where the coroner has turned to this traditional method of investigation?

"An inquest empowers use of the subpena.

"It puts witnesses under oath.

"It makes possible the examination of every possible witness, suspect, relative, records and papers available anywhere.

"It puts the investigation itself into the record.

"And—what's most important of all—it sometimes solves crimes.

"What good reason is there now for Dr. Gerber to delay any longer the use of the inquest?

"The murder of Marilyn Sheppard is a baffling crime.

"Thus far it appears to have stumped everybody.

"It may never be solved.

"But, this community can never have a clear conscience until every possible method is applied to its solution.

"What, Coroner Gerber, is the answer to the question—

"Why don't you call an inquest into this murder?"

Cleveland Press, July 21, 1954, p. 1.

"TIME TO BRING BAY SLAYING INTO OPEN"

"Too many days have passed without positive results in the several investigations of the Bay Village hack-slaying. Undoubtedly the suburb's police officials feel they have conducted the best possible inquiry; county officials and Coroner Samuel R. Gerber's office also undoubtedly feel that

they have acted effectively. But there's been no sign at all of breaking the stalemate over the brutal slaying of Mrs. Marilyn Sheppard.

"We are forced to take note that Dr. Samuel Sheppard, husband of the victim has rejected suggestions of both lie detector and truth serum tests, and has submitted to questioning only when his family and his lawyer have agreed he might.

"Before charges and counter-charges, fights among officials and jealousies smother all efficiency, wouldn't it be wise to bring the whole matter out into the open, with subpenaing and examination of witnesses under oath, for example, at the county's crime laboratory at Western Reserve University? It's time all groups get together as one to find, or attempt to find the solution to this baffling crime."

Cleveland News, July 21, 1954, p. 1.

"GET THAT KILLER"

"It is high time that strenuous action be taken in the Sheppard murder case.

"This newspaper fails to see how bickering among those who have been investigating the 18-day-old mystery can aid in the final aim—to find the murderer, whoever he may be.

"County Coroner Samuel R. Gerber, though he has failed to produce the person who brutally murdered Mrs. Marilyn Sheppard in the bedroom of her Bay Village home, has worked long and hard, and deserves the appreciation of the whole community.

"But it is obvious that Dr. Gerber needs help. The Cleveland police department is equipped to give it. Its crime

laboratories and investigators are among the best in the business. It has no Bay Village friendships which might prove embarrassing.

"True, the case is cold as ice. There has, in our opinion, been a noticeable lack of cooperation on the part of the dead woman's husband, Dr. Samuel M. [sic] Sheppard, who has refused to take a lie detector test, and who yesterday rejected proposals that he submit to a 'truth serum' test.

"He had already been subjected to interrogation, he said; he could not face further interrogation because he is still emotionally upset, and he was reluctant to put himself in a position where he might involuntarily incriminate innocent people.

"The last noble sentiment would, we feel, have been far more noble if Dr. Sheppard had said:

" 'I will be happy to do anything within my power to bring my wife's murderer to justice. If a lie detector test would help, by all means bring it on. If a "truth serum" test would convince you that I have told police all I know in an honest effort to apprehend the murderer, I am at your service, gentlemen.'

"Just as it is easy to 'second-guess' a ball game, it is easy to second-guess a murder investigation.

"It is clear, now, that, because of the social prominence of the Sheppard family in the community, and friendships between the principals in the case and the law enforcement bodies of Bay Village, kid gloves were used throughout all preliminary examinations.

"Possibly the 'bushy-haired man' would have been apprehended long before this if the crime had been investigated with the vigor it deserved; perhaps some other answer

might have been found to solve one of the most brutal murders in the history of Greater Cleveland.

"It is gratifying that the Cleveland police department has accepted the Bay Village Council's invitation to step into the mystery, even at this late date, after once dropping out of the case for some unexplained reason. Competent detectives may yet be able to muster enough evidence to produce the killer.

"Finding the killer should be of the greatest satisfaction to Greater Cleveland, to Bay Village, and to Dr. Samuel Sheppard."

Cleveland Plain Dealer, July 22, 1954, p. 1.

"SLAIN WIFE REVEALED DATES OF DOCTOR, TALK OF DIVORCE"

"• • •

"The audience of more than 200, mostly Bay Village housewives, applauded when William Corrigan, Dr. Sam's attorney, was forcibly ejected from the hearing after insisting vigorously on his right to insert remarks in the record.

"Coroner Samuel R. Gerber, who ordered Corrigan's expulsion, was hugged, kissed and cheered by the spectators after he recessed the three-day hearing to be reconvened later at the County Morgue • • •."

"• • •."

Cleveland Press, July 26, 1954, p. 1.

"CORRIGAN EJECTED AMID CHEERS"

"MOVE FOLLOWS RUNNING CLASH WITH GERBER"

"INQUEST IS RECESSED; OUSTED LAWYER VOWS TO SUE OVER INCIDENT"

"Spectators cheered wildly yesterday as William J. Corrigan, criminal lawyer representing Dr. Samuel H. Sheppard, was half dragged from the room in the closing moments of the Marilyn Sheppard murder inquest in Bay Village.

"As the tumult subsided in the Normandy School auditorium-gymnasium, Coroner Samuel R. Gerber indefinitely recessed the inquiry into the brutal hack-murder of Dr. Sheppard's 31-year-old wife before dawn July 4.

"• • • •"

Cleveland Plain Dealer, July 27, 1954, p. 1.

"WHY DON'T POLICE QUIZ TOP SUSPECT?"
"AN EDITORIAL"

"You can bet your last dollar the Sheppard murder would be cleaned up long ago if it had involved 'average people.'

"They'd have hauled in all the suspects to Police Headquarters.

"They'd have grilled them in the accepted, straight-out way of doing police business.

"They wouldn't have waited so much as one hour to bring the chief suspect in.

"Much less days.

"Much less weeks.

"Why all this fancy, high-level bowing and scraping, and super-cautious monkey business?

"Sure it happened in suburban Bay Village rather than in an 'ordinary' neighborhood.

"So what?

"What difference should that make?

"When they called the Cleveland police in everybody thought:

" 'This is it. Now they'll get some place.'

"Now we'd have vigorous, experienced, expert, big-time action.

"They'd get it solved in a hurry.

"They'd have Sam Sheppard brought in, grill him at Police Headquarters, like the chief suspect in any murder case.

"But they didn't.

"And they haven't.

"In fairness, they've made some progress.

"But they haven't called in Sam Sheppard.

"Now proved under oath to be a liar, still free to go about his business, shielded by his family, protected by a smart lawyer who has made monkeys of the police and authorities, carrying a gun part of the time, left free to do whatever he pleases as he pleases, Sam Sheppard still hasn't been taken to Headquarters.

"What's wrong in this whole mess that is making this community a national laughing stock?

"Who's holding back—and why?

"What's the basic difference between murder in an 'ordinary' neighborhood and one in a Lake Rd. house in suburban Bay Village?

"Who is afraid of whom?

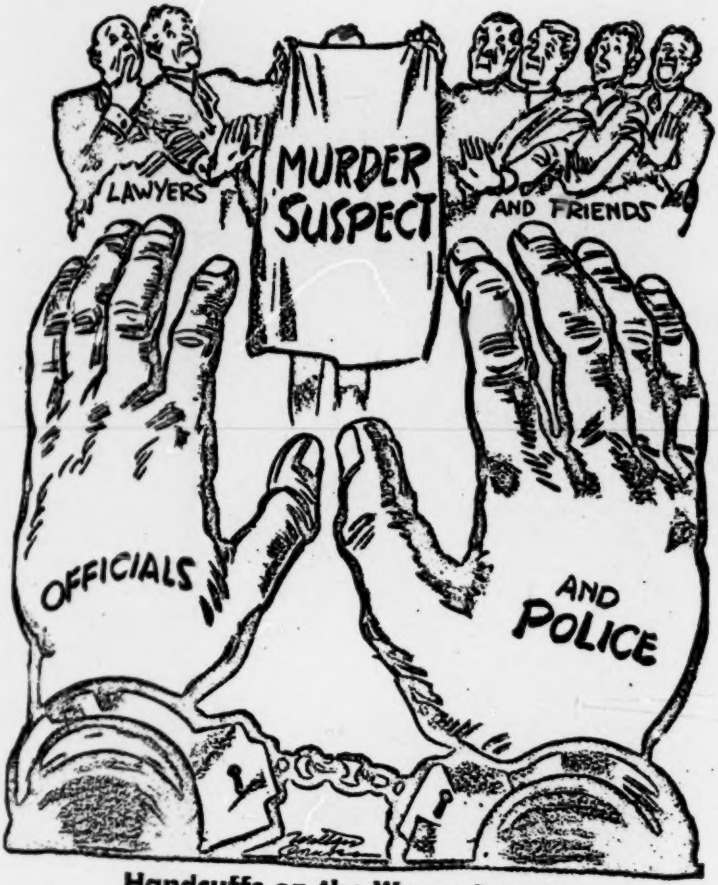
"It's just about time that somebody began producing the answers—

"And producing Sam Sheppard at Police Headquarters."

Cleveland Press, July 28, 1954, p. 1.

Newspaper Cartoon

(See opposite) ☞



Handcuffs on the Wrong People?

Opinion of the District Court

Newspaper Cartoon

(See opposite) ☞

"I Will Do Everything in My Power to Help Solve This Terrible Murder."
—*Dr. Sam Sheppard*

"WHY ISN'T SAM SHEPPARD IN JAIL?"

And in a later edition the headlines were:

"QUIT STALLING—BRING HIIM IN"
"AN EDITORIAL"

"Maybe somebody in this town can remember a parallel for it. The Press can't.

"And not even the oldest police veterans can, either.

"Everybody's agreed that Sam Sheppard is the most unusual murder suspect ever seen around these parts.

"Except for some superficial questioning during Coroner Sam Gerber's inquest he has been scot-free of any official grilling into the circumstances of his wife's murder.

"From the morning of July 4, when he reported his wife's killing, to this moment, 26 days later, Sam Sheppard has not set foot in a police station.

"He has been surrounded by an iron curtain of protection that makes Malenkov's Russian concealment amateurish.

"His family, his Bay Village friends—which include its officials—his lawyers, his hospital staff, have combined to make law enforcement in this county look silly.

"The longer they can stall bringing Sam Sheppard to the police station the surer it is he'll never get there.

"The longer they can string this whole affair out the surer it is that the public's attention sooner or later will be diverted to something else, and then the heat will be off, the public interest gone, and the goose will hang high.

"This man is a suspect in his wife's murder. Nobody yet has found a solitary trace of the presence of anybody else in

his Lake Rd. house the night or morning his wife was brutally beaten to death in her bedroom.

"And yet no murder suspect in the history of this county has been treated so tenderly, with such infinite solicitude for his emotions, with such fear of upsetting the young man.

"Gentlemen of Bay Village, Cuyahoga County, and Cleveland, charged jointly with law enforcement—

"THIS IS MURDER. THIS IS NO PARLOR GAME. THIS IS NO TIME TO PERMIT ANYBODY—NO MATTER WHO HE IS—TO OUT-WIT, STALL, FAKE, OR IMPROVISE DEVICES TO KEEP AWAY FROM THE POLICE OR FROM THE QUESTIONING ANYBODY IN HIS RIGHT MIND KNOWS A MURDER SUSPECT SHOULD BE SUBJECTED TO—AT A POLICE STATION."

"The officials throw up their hands in horror at the thought of bringing Sam Sheppard to a police station for grilling. Why? Why is he any different than anybody else in any other murder case?

"Why should the police officials be afraid of Bill Corrigan? Or anybody else, for that matter, when they are at their sworn business of solving a murder.

"Certainly Corrigan will act to protect Sam Sheppard's rights. He should.

"BUT THE PEOPLE OF CUYAHOGA COUNTY EXPECT YOU, THE LAW ENFORCEMENT OFFICIALS, TO PROTECT THE PEOPLE'S RIGHTS.

"A murder has been committed. You know who the chief suspect is.

"You have the obligation to question him—question him thoroughly and searchingly—from beginning to end, and

not at his hospital, not at his home, not in some secluded spot out in the country.

"But at Police Headquarters—just as you do every other person suspected in a murder case.

"What the people of Cuyahoga County cannot understand, and The Press cannot understand, is why you are showing Sam Sheppard so much more consideration as a murder suspect than any other person who has ever before been suspected in a murder case.

"Why?"

Cleveland Press, July 30, 1954, p. 1.

"BUT WHO WILL SPEAK FOR MARILYN?"

"It's perfect, you think at first, as you look over the setting for the Big Trial.

"The courtroom is just the size to give a feeling of coziness and to put the actors close enough to each other so that in moments of stress the antagonists can stand jaw to jaw and in moments of relaxation can exchange soft words of camaraderie.

"Modern enough for this 'See-Hear' age, with the microphone, the loud speakers on the walls, and the blazing lights for the TV cameras before and after court sessions.

"Yet somberly dignified enough to carry the authentic decor of the traditional court of justice.

"Almost inadequate, old-fashioned hanging light fixtures. Dark furnitture. [sic]. A high bench for his honor, the judge. So high that if he slouches a bit just his head is visible.

"A bit of plaster has fallen from the ceiling over the clerk's desk. The unrepaired spot gives a touch of the dignity of age.

"And on the floor at the end of the trial table—a cuspidor.

"Ah, you think, only a master arranger would have remembered that.

" 'The cuspidor. Put it here.'

"Perfect, you think at first, a masterpiece of setting the stage for the dramatic action of the Big Trial.

"Then it hits you. No, there's something missing.

"What?

"Can what seems to be missing be found in the cast of characters.

"Ah, the cast. Superb, you think at first.

"And complete. Not a character missing.

"And so real, you think. Just like you would expect to see. Why if you didn't know these were people and this was a real setting you would think you were watching a drama on television or a mystery play at a theater.

"His honor, the judge. A quaint Welsh accent. Quick, mobile features that can pass so rapidly through sternness, annoyance, patience and charming friendliness.

"And the chief counsel for the defense. Granite faced, shaggy haired. Now disdainful, now quizzical, now disbelieving, now coaxing, now threatening, now bored.

"These provide the perfect background for the most perfect character of all—the accused. Was there ever more perfect typing? Was there ever a more perfect face for the enigma that is the Big Trial?

"Study that face as long as you want. Never will you get from it a hint of what might be the answer when the curtain rings down on this setting and on these characters. Is he the one? Did he do it?

"Plus of course, the other characters. The accused's two brothers. Prosperous, poised. His two sisters-in-law. Smart, chic, well-groomed. His elderly father. Courtly, reserved. A perfect type for the patriarch of a staunch clan.

"Yes, you think. They wouldn't be more true-to-life if this Big Trial were a television drama.

"Then it hits you again. No there's something—and someone missing.

"What is it? Who is it. Who's still off stage? Waiting perhaps for a cue to come on.

"In the hallway outside the courtroom you stop to talk to Detective Chief James McArthur. He's an old timer at Big Trials. So you ask him. Isn't there someone, something missing?

" 'Sure,' says the detective chief. 'There always is. I'll tell you.

" 'It's the other side, the representatives of what in this case will be officially known as the corpus delicti, in other words, the body of the crime, in still other words—Marilyn Reese Sheppard.

" 'There is no grieving mother—she died when Marilyn was very young.

" 'There's no revenge-seeking brother nor sorrowing sister. Marilyn was an only child.

" 'Her father is not here. Why he isn't, is his own personal business.'

"What then, you wonder, will be the other side.

"It will be there, Inspector McArthur reassures. He opens a thick brief case he carries daily to the courtroom.

" 'Here' he says, 'are the statements and resumes of testimony that will be given by state's witnesses. Here are the

theories and details of the evidence found by dozens of detectives in weeks of work.

" 'Here is the complete story of Marilyn Reese Sheppard. How she lived, how, we think, she died. Her story will come into this courtroom through our witnesses. Here is how it starts: Marilyn Sheppard, nee Reese, age 30, height 5 feet, 7 inches, weight 125 pounds, brown hair, hazel eyes. On the morning of July 4 she was murdered in her bedroom. . . . '

"Then you realize how what and who is missing from the perfect setting will be supplied.

"How in the Big Case justice will be done.

"Justice to Sam Sheppard.

"And to Marilyn Sheppard."

Cleveland Press, October 23, 1954, p. 1.

[This article is included with "Newspaper publicity before trial" although it is recognized that the trial had commenced before it was published; however, the jury had not yet been sworn and the court believes this article to be relevant to the question being considered.]

ADDITIONAL NEWSPAPER HEADLINES: Published before trial, most of which appeared on front pages.

"QUIT WEARING GUN, DOCTOR TOLD"

"DR. SHEPPARD BACKS AWAY FROM 'CRIME DOCTOR' TALK"

"SAYS MRS. SHEPPARD HAD PLANNED DIVORCE"

"SHEPPARD DENIES TRYST WITH WOMAN TECHNICIAN"

"SHEPPARD DENIES AFFAIR, SOBS ON WITNESS STAND"

"KERR URGES ARREST OF DOCTOR; POLICE FIND HOLES IN STORY"

"SLAIN WIFE TALKED OF 'OTHER GIRL' DOCTOR'S MOTHER SAYS"

"GIRL ADMITS AFFAIR, FLIES HERE TO TESTIFY"

"DOCTOR LIES, SUSAN SAYS; TELLS OF GIFTS"

"DR. SAM MADE LOVE BUT DIDN'T TALK ABOUT DIVORCE, SUSAN SAYS"

"STORY OF TECHNICIAN DIFFERENT FROM SHEPPARD'S AT INQUEST"

"DR. SAM FACES QUIZ AT JAIL ON MARILYN'S 'FEAR OF HIM.'"

"15 DETECTIVES GRILL DR. SHEPPARD IN JAIL"

"POLICE ASSERT COUPLE HAD VIOLENT ROWS"

"SCIENCE CUTS THROUGH COVER-UP"

"POLICE END QUIZ AS DOCTOR WINS NO-TALK STRIKE"

"DOCTOR BALKS, QUIZ HALTED"

"5 'OTHER WOMEN' LINKED TO DOCTOR"

"SIXTH WOMAN IS LINKED IN DOCTOR QUIZ"

"[GRAND] JURY WEIGHS EVIDENCE 40 MINUTES AND ACTS"

"THE SHEPPARD STORY: MURDER MYSTERY FULL OF CONTRADICTIONS"

The Court does not deem it necessary to analyze in detail the above quoted newspaper editorials, articles and headlines or the remainder of the five volumes of clippings submitted into evidence. Suffice it to say that each of the three Cleveland newspapers repeatedly printed material which strongly suggested and, in fact, urged petitioner's guilt. Indicative of the suggestion of guilt was the repeated and extensive coverage given to petitioner's refusal to submit to a lie detector test or to receive an injection of truth serum. Headlines, in addition to those already referred to but still only a sampling of the total, stated:

"DOCTOR VARIES STORY, BARS LIE TEST NOW,"

"DR. SHEPPARD REFUSES TO TAKE TRUTH SERUM IN MURDER PROBE,"

"DOCTOR BARS TRUTH TEST," and
"DR. SHEPPARD BALKS AT TRUTH SERUM TEST."

And particular mention must be made of the editorial in the Cleveland Press titled "BUT WHO WILL SPEAK FOR MARILYN" which was printed just prior to the swearing in of the jury, for it was indeed one of the most prejudicial. Ignoring the fact that it was a cheap, sobsister editorial, it literally screamed for petitioner's conviction.

When the Supreme Court of Ohio considered the question of whether the trial court should have granted a change of venue, *Ohio* v. *Sheppard*, 165 Ohio St., 293, 294-297 (1956), the majority opinion of the Court stated:

"• • • Was the atmosphere in Cleveland as a result of the widespread publicity attendant upon this trial such as to require the trial court to grant a change of venue?

"• • • •

"The law does not require this court to be so naive as to refuse to recognize the great amount of publicity accorded this case from the time of the discovery of the crime up to the present time. Every development has been given the 'full treatment' by the press, radio and television. The interest in each phase of the case has not been confined to the Cleveland area or to Ohio. Syndicated columns and news agency reports have made the case almost as well known in every community of the nation as it is in Cleveland.

"It should be borne in mind, however, that the legal question presented to us is whether the defendant was accorded a fair constitutional trial by an impartial jury which could decide the issues of fact solely upon the consideration of the evidence in the light of the law given it by the court. That question is not to be decided on the volume of the publicity or the tendency such publicity may have had in influencing the public mind generally as to the defendant's guilt or innocence.

"• • • •

"We believe the trial court was justified in those rulings (the overruling of each motion for change of venue). In *Townsend* v. *State,* 17 C. C. (N. S.), 380, 25 C. D., 408, affirmed without written opinion in 88 Ohio St., 584, 106 N. E., 1083, it is said:

" 'The examination of jurors on their *voir dire* affords the best test as to whether or not prejudice exists in the community against the defendant; and where it appears that the opinions as to the guilt of the defendant of those called for examination for jurors are based on newspaper articles and that the opinions so formed are not fixed but

would yield readily to evidence, it is not error to overrule an application for a change of venue.'

"• • •

"If the jury system is to remain a part of our system of jurisprudence, the courts and litigants must have faith in the inherent honesty of our citizens in performing their duty as jurors courageously and without fear or favor. Of the 75 prospective jurors called pursuant to this venire only 14 were excused because they had formed a firm opinion as to the guilt or innocence of the defendant. A full panel was accepted before this venire was exhausted, and defendant exercised but five of his allotted six peremptory challenges.

"In the light of these facts, and particularly in the light of the fact that a jury was impaneled and sworn to try this case fairly and impartially on the evidence and the law, this court can not say that the denial of a change of venue by the trial judge constituted an abuse of discretion."

The general rule that a change of venue lies within the sound discretion of the trial judge is well settled. The Courts have also agreed that our jury system is based upon the belief of jurors and when jurors testify that they can discount influences of external factors and meet the standard imposed by the Fourteenth Amendment, that assumption is not lightly to be disregarded, *Rideau* v. *Louisiana*, 373 U. S. 723 (1963). However, and this is a factor which the Supreme Court of Ohio failed to consider, when the circumstances are unusually compelling, the assurances of jurors may be disregarded, though the burden of showing essential unfairness is upon the person who claims such injustice and seeks to have the results set aside, *Rideau* v.

Louisiana, supra, and *Adams* v. *United States ex rel. McCann,* 317 U. S., 269, 281 (1942).

How to protect an accused from the prejudicial effect of newspaper publicity is indeed a serious and difficult problem. The United States Supreme Court has jealously guarded the right of an accused to a fair trial by a panel of impartial jurors and when, after a conviction, it is determined that newspaper publicity so prejudiced the minds of the prospective jurors as to preclude a fair trial, the Court has ordered a new trial. That Court has, of course, recognized that jurors do not live in a vacuum and certain cases are by their very nature apt to generate publicity and jurors will probably have formed some impression or opinion as to the merits of the case. This problem was discussed by the Court in *Irvin* v. *Dowd,* 366 U. S., 717 (1961). In that case, a habeas corpus proceeding was brought to test the validity of petitioner's conviction of murder and sentence of death in the Circuit Court of Gibson County, Indiana. Petitioner contended that his conviction had been obtained in violation of the Fourteenth Amendment in that he did not receive a fair trial. Mr. Justice Clark, in delivering the opinion of the Court stated at pages 722-723:

"* * * In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process * * *.

"It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the in-

terest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court * * *."

The Court, after noting that the jury panel consisted of 430 persons of which the trial judge excused 268 on challenges for cause as having fixed opinions as to the guilt of the defendant, stated at page 727:

"* * * An examination of the 2,783-page *voir dire* record shows that * * * almost 90% of those examined on the point * * * entertained some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty * * *."

The Court then concluded:

"Here the 'pattern of deep and bitter prejudice' shown to be present throughout the community * * * was clearly reflected in the sum total of the *voir dire* examination of a majority of the jurors finally placed in the jury box * * *."

And Mr. Justice Frankfurter in his concurring opinion, at pages 729-730, observed:

"* * * One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a

fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him. How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception."

This Court, though it recognizes that in the instant case only 14 of the 72 prospective jurors examined stated that they had prejudged the guilt or innocence of the accused, has no compunction in finding that the publicity was so prejudicial to petitioner that the assurances of the jurors must be disregarded for in the words of Mr. Justice Frankfurter, "before they [the jurors] entered the jury box, their minds were saturated by press and radio * * * designed to establish the guilt of the accused."

In a case decided after *Irvin* v. *Dowd, supra,* the Supreme Court held it was a denial of due process of law to refuse the request for a change of venue after the people of the community had been exposed repeatedly and in depth to the spectacle of the defendant personally confessing in detail to the crimes with which he was later charged, *Rideau* v. *Louisiana, supra.* In that case, the Court did not examine the transcript of the voir dire in reaching its determination as to prejudice. The Court said at page 727:

"* * * we do not hesitate to hold, without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury, that due process of law in

this case required a trial before a jury drawn from a community of people who had not seen or heard Rideau's televised 'interview' * * * ."

The instant case is analogous to *Rideau* in that regardless of what might have been said in the voir dire examination, the community was so prejudiced against petitioner that a fair trial could not be had. See, as one overt example of the prejudice against petitioner, the newspaper reports that the "spectators cheered wildly" and "hugged and kissed" the coroner when he ordered petitioner's counsel ejected from the inquest, supra, at page 31.

As stated in *Delaney* v. *United States,* 199 F. (2d), 107, 112-113 (1 Cir., 1952) by Judge Magruder:

" * * * One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pretrial publicity. This is particularly true in the determination of issues involving the credibility of witnesses."

And as stated by Mr. Justice Jackson, concurring in *Krulewitch* v. *United States,* 336 U. S., 440, 453 (1949):

"The naive assumption that prejudicial effects can be overcome by instructions to the jury, * * * all practicing lawyers know to be unmitigated fiction."

This Court now holds that the prejudicial effect of the newspaper publicity was so manifest that no jury could have been seated at that particular time in Cleveland which would have been fair and impartial regardless of their as-

surances or the admonitions and instructions of the trial judge.

Publicity during trial. From the day the trial began, the *Sheppard case* dominated the Cleveland newspapers. It would be impractical to quote extensively from the articles which were published during trial; the Court will present only one. It is indeed a glaring example of prejudicial reporting and appeared on page 1 of the Cleveland Press on November 24. The headlines were:

"SAM CALLED A 'JEKYLL-HYDE' BY MARILYN, COUSIN TO TESTIFY"

The text of the article stated:

"Two days before her death, murdered Marilyn Reese Sheppard told friends that her accused husband, Dr. Samuel H. Sheppard, was 'a Dr. Jekyll and Mr. Hyde.'

"The prosecution has a 'bombshell witness' on tap who will testify to Dr. Sam's display of fiery temper—countering the defense claim that the defendant is a gentle physician with an even disposition.

"One of Mrs. Sheppard's 'Dr. Jekyll and Mr. Hyde' statements was made to Bay Village Mayor J. Spencer Houk as recently as last June, The Press learned.

"Houk, according to his statement to the authorities, had expressed surprise at Marilyn's account of a display of Sam's anger.

" 'You don't know that guy,' he quoted the murder victim as replying. 'He's a regular Dr. Jekyll and Mr. Hyde. . . .'

"Mrs. Sheppard used the 'Jekyll-Hyde' expression frequently in confidential conversations during the past several years, friends and relatives have told the murder investigators.

"THE 'BOMBSHELL WITNESS' IS THOMAS WEIGLE, 26, OF 15897 NELAMERE RD., EAST CLEVELAND, MARILYN'S FIRST COUSIN.

"Weigle and his wife, Marian, and son, Gordon visited Sam and Marilyn Sheppard's home at 28924 Lake Rd., Bay Village, a Sunday in March, 1952.

"The two women were in the kitchen, Weigle related, while he and Dr. Sam were watching a western movie on television. The Sheppards' only son, Sam (Chip) Jr., then five years old, was playing in the room.

"Chip, Weigle said, tapped his father's arm—either playfully or accidentally.

"'SAM'S FACE REDDENED,' WEIGLE CONTINUED. 'HE WHISKED THE BOY UP, TOSSED HIM ACROSS HIS LEGS, AND BEGAN BEATING HIM ON HIS BACK, LEGS AND BUTTOCKS.'

"'AS HE STRUCK THE BOY REPEATEDLY, SAM SAID: "DON'T YOU EVER HIT ME AGAIN . . . . DON'T YOU EVER DO THAT AGAIN!" . . .'

"* * * *."

Thomas Weigle, or the "bombshell witness" as he was characterized by the Cleveland Press, did not testify, as that newspaper had said he would, that petitioner was a "Jekyll-Hyde." However, the damage to petitioner was completed when the newspaper was circulated. As stated by counsel for petitioner in his brief: "It is difficult to imagine any characterization more damaging to a doctor on trial for a monstrous murder." The schizophrenic character in Robert Louis Stevenson's novel was at times a peaceable, respected doctor and at times a bloodthirsty killer. The attempt to analogize petitioner and a schizophrenic murderer is only one example of the type of slanted

and prejudicial newspaper publicity which attended the trial. Other examples are the following headlines:

"CALLS DR. SAM LOVE SLAYER, ASKS DEATH"

"MARILYN'S PICTURES STIR COURT"

"DEFENSE STRESSES 'HOW' NOT 'WHO' TO MARILYN'S DEATH"

"DEFENSE AIMS TO SET WALL OF DOUBT AROUND DR. SAM"

"DOCTOR SAM'S PROWLER STORY HIT"

"LAB MEN READY ATTACK ON SAM"

"DRENKHAN [A Patrolman] RIPS 'PROWLER' VIEW"

"STORY OF ILLICIT ROMANCE WILL CLIMAX TRIAL"

"STATE SPRINGS 2 BLOOD CLEWS"

"HIT DEFENSE 'BURGLARY' PLEA; * * *"

"CORONER IS FIRM UNDER CORRIGAN FIRE"

"CORRIGAN STRUGGLES TO REVIVE 'INTRUDER' AS RECALLED BY SAM"

"TESTIFIES SAM CHANGED STORIES"

"DR. SAM'S SIX STORIES SPIN TANGLED SKEIN"

"ASSERTS STEVE COACHED DR. SAM"

"STATE HITS DR. SAM ON 17 POINTS"

"SHEPPARD DEFENSE AIMED AT CHRISTMAS VERDICT"

"PARRINO RIPS DR. STEVE'S STORY OF SCENE ON MURDER MORNING"

"TRIPS DR. STEVE ON NEW VERSION OF LOOK AT BODY"

—524—

"TESTIMONY OF DR. STEVE SHOWS CHANGE IN STORY"

"DR. STEVE ADMITS 2 ERRORS"

"DR. SAM FACES ATTACK ON LOVES"

"BARE-FACED LIAR KERR SAYS OF SAM" [Kerr did not testify at the trial]

"DR. SAM ADMITS TWO MORE ROMANCES DURING MARRIAGE"

"WITNESS TELLS OF 'FLIRTATIONS' IN STATE QUIZ"

"DR. SAM QUIZZED ON OTHER WOMEN"

"STATE'S LAST WORD; 'SAM FAKED BURGLARY TO COVER UP MURDER'"

In addition to the prejudicial effect of the newspaper publicity, petitioner also alleges error due to certain radio publicity. During the trial, counsel for petitioner advised the trial judge that a broadcaster, Robert Considine, announced over the radio a comparison between petitioner and Alger Hiss. Counsel requested the judge to ask the jury if they had heard the broadcast because of its prejudicial effect. The judge refused and stated:

"THE COURT: • • • Well, I don't know, we can't stop people, in any event, listening to it. It is a matter of free speech, and the court can't control everybody.

"MR. MAHON: [an assistant prosecutor] I think that the court has instructed the jury that they are not to read

about it or listen to the broadcasts. It was a general instruction that was given at the time the trial started.

"THE COURT: We are not going to harass the jury every morning.

"MR. CORRIGAN: [petitioner's chief trial counsel] I can't help it, Judge. If you don't that's all right with me. I make my exception.

"THE COURT: It is getting to the point where if we do it every morning, we are suspecting the jury. I have confidence in this jury, and we must have confidence or the jury system is of no value whatever to anybody.

"MR. CORRIGAN: The jury are human beings and this situation around here is unprecedented in the history of trials in the United States."

Regarding unfavorable publicity during trial, the Court of Appeals for the Sixth Circuit, in *Krogmann* v. *United States,* 225 F. (2d), 220, 228 (1955), stated:

"Unfavorable publicity to a defendant given in newspapers about a pending jury trial is not necessarily grounds for setting aside a verdict, but under certain circumstances may result in prejudice to a defendant so as to cause a mistrial. Generally, an incorrect unfavorable report of the evidence presented against a defendant on a material issue, which comes to the attention of a juror or jurors during the pendency of the trial raises a rebuttable presumption that the rights of the defendant have been prejudiced. The District Judge should ascertain if the report has come to the attention of a juror and if so, take the necessary steps to rebut such presumption, and if not convinced that the presumption has been rebutted, declare a mistrial * * *."

And in *Marshall* v. *United States,* 360 U. S., 310 (1959), the Supreme Court reversed a conviction in the Federal

District Court where some of the jurors saw and read newspaper articles which were prejudicial to defendant. The Court said, at pages 312-313:

"The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. * * * Generalizations beyond that statement are not profitable, because each case must turn on its special facts. We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. * * * It may indeed be greater for it is then not tempered by protective procedures."

It must be recalled that the jury in this case was not sequestered until the cause was submitted to them after the charge of the court. It is clear beyond doubt, because of the sheer volume of publicity which attended the trial, that the jury read and heard about the case through the news media.[4] In fact, the record shows, at page 5429 of the Bill of Exceptions, that the trial judge asked if any juror had heard a certain broadcast by Walter Winchell and two jurors replied that they had.[5]

This Court holds there was such a plethora of prejudicial material contained in the newspapers that no admonition or

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[4] On this point, see infra, at pages 526 and 527.

[5] In that broadcast, it was reported that a woman, then under arrest for robbery, had stated that "she was the mistress of Sam Sheppard, and that he was responsible for the birth of a child." Each of the jurors who had heard the broadcast answered "No" to the question: "Would that have any effect upon your judgment?"

charge of the court could vitiate the effect of the publicity. Further, the trial judge committed error when he failed to question the jury regarding the Robert Considine broadcast. It was incumbent upon the judge to take every precaution to insure that highly prejudicial material did not infect the minds of the jury. *Holmes* v. *United States,* 284 F. (2d), 716 (4 Cir., 1960). It has even been held that where there is highly prejudicial publicity, the judge should carefully examine each juror out of the presence of the others to determine the effect of the articles on those who had read them and whether they had discussed the articles with others, *United States* v. *Accardo,* 298 F. (2d), 133, 136 (7 Cir., 1962).

The Court also notes the manner in which the trial judge allocated the courtroom to members of the news media. It is one thing to accommodate the news media; it is quite different when a major portion of the courtroom is reserved for it. Here a comparatively small courtroom was reserved primarily for the news media and the trial became its showpiece. The Supreme Court of Ohio characterized the atmosphere surrounding the trial as "a 'Roman holiday' for the new media." Under such circumstances, the requisite atmosphere for a fair trial could not, and in fact did not, exist.

Any one of the above mentioned factors, i.e., the insidious, prejudicial newspaper reporting, the refusal of the trial judge to question jurors regarding an alleged prejudicial radio broadcast and the carnival atmosphere which continued throughout the trial, would be sufficient to compel the conclusion that petitioner's constitutional rights were violated. But when they are cummulated, this Court cannot, unless it were to stretch its imagination to a point of fantasy, say the petitioner had a fair trial in view of the publicity during trial.

The Court cannot pass to the next claim of error without pausing to comment further on the manner in which the three Cleveland newspapers reported the murder of Marilyn Sheppard and the subsequent events. It is often difficult to draw the line between propriety and impropriety in newspaper reporting. Newspapers have the right and indeed an obligation to the community to advocate and to criticize. But with respect to the Sheppard case, there can be no doubt as to the impropriety in the manner in which it was reported by the Cleveland newspapers. The inflammatory and prejudicial reporting did not subside when the trial began; it continued throughout the trial. And special note must be given to the attempt of the newspapers to influence the jury. It was startling to find photographs of the entire jury and of individual jurors (at times giving their home addresses) in no less than 40 issues of the Cleveland newspapers. The Court need not be naive, and it does not stretch its imagination to recognize that one of the purposes of photographing the jurors so often was to be assured that they would look for their photographs in the newspapers and thereby expose themselves to the prejudicial reporting. Also, the newspapers ran editorials praising the trial judge (he was a candidate for re-election) and published photographs and sketches of him in at least 46 separate issues. This was certainly an attempt to bring him around to their way of thinking.

If ever there was a trial by newspaper, this is a perfect example. And the most insidious violator was the Cleveland Press. For some reason that paper took upon itself the role of accuser, judge and jury. The journalistic value of its front page editorials, the screaming, slanted headlines and the nonobjective reporting was nil, but they were calculated to inflame and prejudice the public. Such a com-

plete disregard for a sense of propriety results in a grave injustice not only to the individual involved but to the community in general. Public officials, the courts and the jury are unable to perform their proper functions when the news media run rampant, with no regard for their proper rule. Numerous responsible newspapers and magazines noted this abuse of freedom of the press and published editorials[6] which were highly critical of the Cleveland newspapers, especially the Cleveland Press.

Freedom of the press is truly one of the great freedoms which we cherish; but it cannot be permitted to overshadow the rights of an individual to a fair trial. As stated by Mr. Justice Jackson in his concurring opinion in *Shepherd* v. *Florida,* 341 U. S., 50, 53 (1951):

"• • • Newspapers, in the enjoyment of their constitutional rights, may not deprive accused persons of their right to fair trial • • •."

On this subject, an often quoted opinion is that of Mr. Justice Frankfurter concurring in *Pennekamp* v. *Florida,* 328 U. S., 331, 354-356 (1945), wherein he stated:

"Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society. The scope and nature of the constitutional protection of freedom of speech must be viewed in that light and in that light applied • • •.

"A free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies responsibility in its exercise. No institution in a democracy,

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[6] These editorials are reproduced in the Appendix to the petition for writ of certiorari and are part of the evidence in this case, see supra, page 495.

either governmental or private, can have absolute power. Nor can the limits of power which enforce responsibility be finally determined by the limited power itself. • • • In plain English freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise • • •." [Footnotes omitted.]

By its actions in the Sheppard case, the Cleveland Press showed no respect for its responsibilities. If ever a newspaper did a disservice to its profession; if ever the cause of freedom of the press was set back, this was it. The failure of that newspaper and the two other Cleveland newspapers to adhere to their responsibilities cannot be permitted to deny petitioner his right to a fair trial.

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Article in The Cleveland Press of July 21, 1954

(See opposite) ☞

The Cleveland Press

The Newspaper That Serves Its Readers

NO. 24030 ** CLEVELAND, WEDNESDAY, JULY 21, 1954 Phone CHerry 1-1111

Home

64 Pages 7 Cents

KNOW KILLER, STORY SAYS

Doctor Bars Truth Test

Cleveland Police Take Over Probe of Bay Slaying

BULLETIN

The Cleveland Police Department today was ordered to take over the Marilyn Sheppard murder investigation by Mayor Celebrezze. Capt. Dave Kerr, homicide squad head, is being recalled from a Florida vacation, to take charge.

The Cleveland Police Department prepared today to take over the 17-day-old investigation of the brutal murder of Mrs. Marilyn Sheppard as Police Chief Frank Story said he "is convinced of the identity of the murderer."

"But the suspect has his story down pat," he added. "And if he stays pat, there isn't much that we can do."

After consulting his attorneys, Dr. Sheppard today refused to submit to a "truth serum" injection to aid the investigation.

Having declared that his "present emotional condition and his present state of fatigue make it impossible for him to agree to a further ordeal of this kind" and that he "cannot face further interrogation," Dr. Sheppard was reported unavailable at Bay View Hospital because he "is in surgery."

Reasons for Refusal

Here are the reasons given by Dr. Sheppard for refusing to submit to a "truth serum" test to aid the investigation of his wife's murder.

The statements were made public by Coroner Samuel Gerber:

"He already had been subjected to interrogation shortly after the crime and while he was under barbiturate sedation. If he had anything to communicate, he believes it would have been communicated at that time.

"He cannot face further interrogation. His present emotional condition and his present state of fatigue make it impossible for him to agree to a further ordeal of this kind.

"He is reluctant to put himself in a position in which he might make statements that would incriminate innocent people."

Fails to Telephone

The 30-year-old osteopath snubbed attempts of Dr. Alan R. Moritz, head of the pathology department of Western Reserve University Medical School, to contact him for a reconsideration request.

Dr. Sheppard failed to telephone Dr. Moritz at a time he had promised to do so.

"We can interpret this as meaning we can expect no further cooperation from Dr. Sheppard in this investigation," declared Coroner Gerber.

This development came as Mayor Celebrezze conferred with Safety Director John McCarmick and Chief Story to determine the extent to which the Cleveland police might "move in" on the unsolved murder.

The city's chief counsel, Jo-

Turn to Page 7, Column 3

Assistant Prosecutor John J. Mahon today asked the wives of Dr. Stephen Sheppard and Dr. Richard Sheppard, brothers of Dr. Samuel H. Sheppard, to come in for questioning in the Marilyn Sheppard murder investigation.

6 U. S. Citizens to Be Released by Chinese Reds

GENEVA, July 21 —(UP)— Red China informed the United States today that it is releasing six American citizens held in China and that the cases of other U. S. citizens detained there are under review.

The United States announced, simultaneously, that it is releasing 15 Chinese students previously detained in the U. S.

The exchange agreement was reached at a meeting here between Alfred Jenkins, a member of the U. S. Indochina Conference Delegation, and Pu Shan of the Chinese Communist Delegation.

The six Americans are: Ernest Kutz, Reuben Lenzer, Linus Lenzbard, John B. Maye, Lawrence Mullin and Alfred Peter Pattison.

The announcement added that "the Chinese Communists' representative stated further that the cases of other detained Americans are still under review. Jenkins expressed the hope that those detained Americans would be released shortly."

BLOODSTAINED trousers worn by Dr. Samuel H. Sheppard when he reported wife's death.

ONE OF MANY MYSTERIES of Sheppard murder case is how this pillow got bloodstained on both sides. Did killer use it to muffle Marilyn Sheppard's outcries? Did he wipe murder weapon or his hands on it?

Story Sure He Knows Identity of Murderer

(Continued From Page One)

seph Crowley, was called into the session.

Detective Chief James McArthur indicated that an early step would be to bring in Dr. Samuel H. Sheppard, the victim's husband, for questioning.

"It won't be an interview," McArthur said. "We don't interview suspects—we interrogate them. And on our own grounds, without their attorneys present."

McArthur awaited definite orders from City Hall before instructing his 20-man homicide detail to take over the case from the nine-man Bay Village police force.

Votes Probe Fund

The Bay Village City Council voted last night to turn over the case to Cleveland police, appropriating $5000 to pay their expenses, and indicating more money would be made available if required.

Celebrezze said his impulse was to have the Cleveland force move into the case without delay, but he would withhold final decision until he studies the exact wording of the Bay Village resolution.

McCormick said he was confident the Cleveland homicide squad could crack the case, and "we probably have to take over."

Story balked, describing the case as "almost beyond solution."

Will Obey Mayor

"But I'll take orders from the mayor," he added.

Story said he wouldn't quibble about taking over the case "if this was a series of murders and the whole community was endangered."

Meanwhile, Dr. Sheppard was under heavy pressure to submit either to a lie detector test or an injection of "truth serum" to aid the investigation.

Dr. Sheppard had previously refused to take a lie detector test because he said he was "emotionally disturbed," and the results might be inaccurate.

Balks at Truth Serum

He also balked when Dr. Moritz suggested the sodium pentothal injection.

Sodium pentothal is a sedative drug which releases the subconscious mind. Under the drug, a patient either tells the truth, what he believes to be the truth, or what he has convinced himself is the truth.

The argument presented to Dr. Sheppard was that, under the drug, questioned by a trained psychiatrist, he might recall some details of the murder morning which would aid investigators in solving the mystery.

That Dr. Gerber did not intend to accept Dr. Sheppard's refusal to submit to further questioning as final was indicated by the fact that the coroner had a sheaf of subpenas in his pocket.

"I have them for use in the Sheppard case, when necessary," Dr. Gerber said. "I don't know when I'll have to get rough, but I'm prepared to do so the moment it will aid the investigation in any way."

Dr. Gerber said he was not prepared to call a formal coroner's inquest, in which witnesses would be compelled to testify under oath, "at this time."

Dr. Moritz told Dr. Sheppard authorities were forced to question some parts of his version of how he heard an outcry from the upstairs bedroom of his home at 28924 Lake Rd., Bay Village, on the murder morning.

The osteopath's account was that he rushed upstairs in time to see a tall, bushy-haired intruder beating his wife to death. He grappled with the killer, Dr. Sheppard said, and was twice knocked unconscious in battles in the hallway and on the beach, where he pursued the madman.

McArthur said he couldn't understand why a bereaved husband would hesitate to do all in his power to assist in trapping the killer—including submitting to a lie test or a "truth serum" injection.

BRUTAL SAVAGERY of the murder of Marilyn Sheppard is demonstrated by these bloodstains on the closet and hall doors of upstairs bedroom in which she was slain. Blood splattered several feet through air.

The Cleveland P

The Newspaper That Serves Its Readers

NO. 24024 ** CLEVELAND, MONDAY, JULY 26, 1954

KERR ASKS DOCTOR

Homicide Capt. David Kerr, flying home from a Miami vacation to join the investigation of the slaying of Mrs. Marilyn Sheppard, recommended today that Dr. Samuel H. Sheppard be arrested "for investigation of murder."

Kerr said the slain woman's husband should be held for interrogation at Central Police Station.

Reached by The Press before he took off from Miami, Kerr said: "If there had been an immediate arrest, the case would have been solved in four hours."

Kerr declared that he wanted to determine who prevented continuous interrogation of Dr. Sam immediately after he reported his wife's murder.

"In homicide investigations," Kerr said, "I treat doctors and lawyers and everyone else just alike."

Police Chief Frank W. Story commented: "That's what should have been done in the beginning, but the situation is more complicated now."

Story said his men have definite evidence which "flatly contradicts" several statements made by Dr. Sheppard under oath at a coroner's inquest which resumed today at the Normandy School in Bay Village.

It was believed that Dr. Sheppard would be recalled to the witness stand to be confronted with these contradictions.

When Dr. Sheppard concluded his testimony Friday, Coroner Samuel R. Gerber ordered him to "hold yourself available at all times."

Dr. Gerber said his inquest would be adjourned indefinitely after today's session, subject to being reconvened at any time.

At the last minute, Dr. Gerber decided to excuse Sam (Chip) Sheppard Jr., six-year-old son of the murdered Marilyn, from testifying.

Chip was asleep next door to his parents' bedroom when his mother was bludgeoned to death July 4 in their home at 28924 Lake Rd. He earlier told Deputy Sheriff Carl Rossbach he hadn't heard anything.

"The boy couldn't add anything," Gerber said.

Miss Susan Hayes, West Coast Sam, gave an account at Los A... Prosecutor Thomas Parrino and ... Robert Schottke which contradicte... pard's witness stand statements.

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Story assigned sewer cleaning ...

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S DOCTOR'S ARREST

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"The boy couldn't add anything at this time," Dr. Gerber said.

Miss Susan Hayes, West Coast companion of Dr. Sam, gave an account at Los Angeles to Assistant Prosecutor Thomas Parrino and Homicide Detective Robert Schottke which contradicted some of Dr. Sheppard's witness stand statements.

Chief Story said a May Co. salesman was prepared to testify that Dr. Sam purchased two hunting knives and a fishing rod at the downtown department store some time prior to his wife's murder. On the witness stand, Dr. Sam said he had no recollection of a knife purchase. He was not asked about the fishing rod.

"We are trying to determine what happened to the fishing rod," Story said.

According to Dr. Gerber, the chief added, the weapon with which Mrs. Sheppard was struck 25 or more savage blows was "very likely a heavier object than a fishing rod."

Story assigned sewer cleaning experts to check the plumbing and downspouts of the Sheppard home today in a renewed search for the missing murder weapon and Dr. Sam's mysteriously vanished T-shirt.

The police chief made this observation: "The case looks more encouraging than at any time since we took it over. Our hopes for a definite solution are rising."

Detective Chief James McArthur disclosed that scientific tests at the Sheppard home have definitely established that the killer washed off a trail of blood from the murder bedroom to the downstairs section.

The tidy murderer, McArthur said, missed a few specks of blood on the stair risers.

"My conclusion," he added, "is that this blood dripped from the murder weapon."

When to present the 22-day-old murder case to the Cuyahoga County Grand Jury is the subject of constant conferences in the office of Prosecutor Frank T. Cullitan.

58a

Article in The Cleveland Press of July 30, 1954

(See opposite) ☞

SCRIPPS-HOWARD

The Cle

The

NO. 24028 CLE

Why Isn't Sa

(AN EDITORIAL)

Maybe somebody in this town can remember a parallel for it. The Press can't.

And not even the oldest police veterans can, either.

Everybody's agreed that Sam Sheppard is the most unusual murder suspect ever seen around these parts.

Except for some superficial questioning during Coroner Sam Gerber's inquest he has been scot-free of any official grilling into the circumstances of his wife's murder.

The Suspect

From the morning of July 4, when he reported his wife's killing, to this moment, 26 days later, Sam Sheppard has not set foot in a police station.

He has been surrounded by an iron curtain of protection that makes Malenkov's Russian concealment amateurish.

His family, his Bay Village friends—which include its officials—his lawyers, his hospital staff, have combined to make law enforcement in this county look silly.

The longer they can stall bringing Sam Sheppard to the police station the surer it is he'll never get there.

The longer they can string this whole affair out the surer it is that the public's attention sooner or later will be diverted to something else, and then the heat will be off, the public interest gone, and the goose will hang high.

This man is a suspect in his wife's murder. Nobody yet has found a solitary trace of the presence of anybody else in his Lake Rd. house the night or morning his wife was brutally beaten to death in her bedroom.

And yet no murder suspect in the history of this county has been treated so tenderly, with such infinite solicitude for his emotions, wit
the young man.

Gentlemen of Bay Village,
Cleveland, charged jointly wit

**This is murder. This is no
me to permit anybody—no m
vit, stall, fake, or improvise de
he police or from the questio
ind knows a murder suspect
t a police station.**

The officials throw up thei
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't Sam Sheppard in Jail?

solicitude for his emotions, with such fear of upsetting the young man.

Gentlemen of Bay Village, Cuyahoga County, and Cleveland, charged jointly with law enforcement—

This is murder. This is no parlor game. This is no ime to permit anybody—no matter who he is—to out-vit, stall, fake, or improvise devices to keep away from he police or from the questioning anybody in his right ind knows a murder suspect should be subjected to—t a police station.

The officials throw up their hands in horror at the hought of bringing Sam Sheppard to a police station for grilling. Why? Why is he any different than anybody else in any other murder case?

Why should the police officials be afraid of Bill Corrigan? Or anybody else, for that matter, when they are at their sworn business of solving a murder.

Certainly Corrigan will act to protect Sam Sheppard's rights. He should.

But the people of Cuyahoga County expect you, the law enforcement officials, to protect the people's rights.

A murder has been committed. You know who the chief suspect is.

You have the obligation to question him—question him thoroughly and searchingly—from beginning to end, and not at his hospital, not at his home, not in some secluded spot out in the country.

But at Police Headquarters—just as you do every-other person suspected in a murder case.

What the people of Cuyahoga County cannot understand, and The Press cannot understand, is why you are showing Sam Sheppard so much more consideration as a murder suspect than any other person who has ever before been suspected in a murder case.

Why?

NO. 24037 ** CLEVELAND, TUESDAY, AUGUST 10, 1954 Phone CHerry 1-1111

DOCTOR EVIDENCE IS READY FOR JURY

Investigation Is Nearly Completed

Police have virtually completed their investigation of the July 4 murder of Mrs. Marilyn Reese Sheppard.

Their conclusion is that they have "convicting evidence" to prove that Dr. Samuel H. Sheppard, osteopath husband of the victim, was the killer.

The evidence is being turned over to Prosecutor Frank T. Cullitan and is ready for presentation to the Grand Jury "whenever he sees fit."

These were the statements today of Detective Chief James McArthur, directing the 15-man homicide squad Sheppard murder case detail.

Assistant Prosecutor John J. Mahon said the case would be presented to the Grand Jury for indictment after Dr. Sheppard's preliminary hearing in a magistrate's court.

That hearing has been indefinitely delayed by Chief Defense Counsel William J. Corrigan's charge that his client could not receive a fair hearing in Bay Village Mayor's Court. Trial of this contention is set for 10:15 a. m. Thursday before Common Pleas Judge Frank J. Merrick.

Prosecutor Frank T. Cullitan, Police Chief Frank W. Story and Detective Chief James McArthur conferred at the Criminal Courts Bldg. late today to devise "new strategy" for handling the Marilyn Sheppard murder case. The police were believed to be pressing for early Grand Jury action.

Cullitan said the case is now proceeding satisfactorily, and there is "no hurry" about obtaining an indictment. He said no Grand Jury action is contemplated this week, and he has no plan to bypass the preliminary hearing.

The prosecutor announced that the complete physical examination of Dr. Sheppard at City Hospital last week "substantially confirms the inquest testimony of Dr. Richard Hexter."

Punctured Claim of Injury

Dr. Hexter punctured the claim of Dr. Sheppard's family that he had suffered a serious neck injury in what he claimed was a series of struggles with the killer.

He said Dr. Sam's neck was uninjured when he examined it on the morning of July 4, and the osteopath had only face injuries.

The City Hospital examination supported Dr. Hexter's finding that there was no need for Dr. Sam to wear the protective neck collar which has become his trade mark since his wife's death.

Although Dr. Sheppard has steadfastly denied his guilt, McArthur and Coroner Samuel R. Gerber said a web of physical evidence has traced out his actions on the murder morning.

The investigators have reached the conclusion that Dr. Sheppard struck his wife 25 or more times in a flash of fury.

What sparked off the blind rage is uncertain—but the investigation has developed a pattern of marital strife, punctuated by disputes over "other women" and sporadic talk of possible divorce.

Dr. Gerber said the investigation indicates that Mari-

Turn to Page 7, Column 2

Police Confident of Evidence for Sheppard Trial

(Continued From Page One)

lyn was a devoted mother and dutiful wife, while her husband was a philanderer.

Both McArthur and Dr. Gerber have concluded that the missing murder weapon was thrown into Lake Erie.

The coroner said the waters of the lake were probably used by the killer to wash his victim's blood off his hands and clothes.

It was disclosed today that Dr. Sheppard sometimes brought women guests to Bay Village Hospital to watch him perform delicate brain operations. He was the only osteopathic neuro-surgeon practicing in northern Ohio.

Proud of his skill, Dr. Sam took a 17-year-old Bay Village High School senior to watch him perform a particularly difficult operation. Later, he gave her a complete description of the techniques he employed and the difficulties he encountered.

Dr. Sam was at one time physician for the Bay Village High School football team. Marilyn formerly gave basketball instruction for Bay Village girls at the high school on Saturday mornings.

The 30-year-old osteopath, who resumed operating at Bay View Hospital the day after his wife's funeral, spent his 11th day in the County Jail today.

Homicide detectives made no effort to question him, having concluded that his refusal to discuss the case "on advice of counsel" was final.

Dr. Sheppard admitted intimacies with Miss Susan Hayes, 24, former Bay View Hospital laboratory technician, but declined to discuss his other extra-marital affairs.

He previously testified under oath that Marilyn had urged him to telephone Susan during a Los Angeles trip last March, but altered his story when Miss Hayes returned to Cleveland to contradict his testimony.

Hosts Give Clew

Miss Hayes made her admissions only after Dr. and Mrs.

Dr. Sheppard's impending murder trial.

Mahon said the trial would probably take place this fall.

Sole issue of the Thursday hearing before Judge Merrick is whether Bay Village Council President Gershom M. M. Barber could give Dr. Sheppard a fair preliminary hearing. If Merrick rules otherwise, he will transfer the hearing to another suburban mayor's court or Cleveland Municipal Court.

The presiding magistrate at a preliminary hearing is empowered only to hold a felony defendant for Grand Jury action. However, Prosecutor Cullitan has already made the decision to take the case to the Grand Jury—either following the hearing or on his own initiative.

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Hosts Give Clew

Miss Hayes made her admissions only after Dr. and Mrs. Arthur Miller of Los Angeles, at whose home Dr. Sam and Susan were guests, made a statement to Assistant Prosecutor Thomas Parrino and Homicide Detective Robert Schottke.

The Millers said they had known for years that Dr. Sheppard "didn't take his marriage vows too seriously," but were astonished when he brought "another woman" to their home.

Investigators said that Dr. Sheppard did not lavish expensive gifts or entertainment on his woman friends. He was also "pretty tight" in money matters with his murdered wife, they said.

Some of the furniture which Mrs. Sheppard had asked her husband to replace, when he chose to buy a new Jaguar sports car instead, was removed from the murder home at 28924 Lake Rd. yesterday and taken to the County Morgue on Adelbert Rd.

Dr. Gerber said the murder bed, the downstairs sofa, the chair from Dr. Sam's study and two blood-spattered doors would remain at the morgue until taken to a courtroom for

ing. If Merrick rules otherwise, he will transfer the hearing to another suburban mayor's court or Cleveland Municipal Court.

The presiding magistrate at a preliminary hearing is empowered only to hold a felony defendant for Grand Jury action. However, Prosecutor Cullitan has already made the decision to take the case to the Grand Jury—either following the hearing or on his own initiative.

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JOHN F. DAVIS, CL

No. 490

IN THE

Supreme Court of the United States

October Term, 1965

SAMUEL H. SHEPPARD,

Petitioner,

vs.

R. L. MAXWELL, WARDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

WILLIAM B. SAXBE,
Attorney General of Ohio,

and

DAVID L. KINDLER,
Assistant Attorney General,
Attorneys for Respondent.

MIDWEST LAW PRINTING AND PUBLISHING, INC., Columbus, Ohio 43215

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SAMUEL H. SHEPPARD,

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E. L. MAXWELL, WARDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Ohio, Eastern Division is reported at 231 F. Supp. 37 (S.D. Ohio 1964) and the opinion of the United States Court of Appeals for the Sixth Circuit is reported at 346 F. 2d 707 (6th Cir. 1965).

STATEMENT OF THE CASE

Marilyn Sheppard, petitioner's pregnant young wife, was bludgeoned to death in the bedroom of her lakeshore home during the early morning hours of July 4, 1954. Dr. Sheppard told police that he had wakened from his sleep on a couch in the downstairs living room by a noise or cry

from upstairs, ascended the stairs, and was knocked unconscious while grappling with an unidentifiable white "form" standing next to his wife's bed. He further stated that upon recovering, he pursued the form out of the house, to be again knocked out while struggling on the shore. The evidence disclosed that Dr. Sheppard had recently been unfaithful to his wife.

The United States Court of Appeals for the Sixth Circuit has set out in its opinion such a direct, concise and accurate history of the case that respondent does not feel it necessary to attempt to improve upon it. Therefore, respondent sets forth below the history of the case made by the Court of Appeals.

> "Appellant, Warden of the Ohio State Penitentiary, appeals from a United States District Court order declaring void the 1954 conviction of petitioner, Dr. Samuel H. Sheppard. Judgment had been entered in the Court of Common Pleas of Cuyahoga County, Ohio, upon a jury verdict convicting Sheppard of the second-degree murder of his wife. Upon his appraisal of trial and pretrial publicity and other matters, the District Judge concluded that Dr. Sheppard did not have a fair trial and was thus deprived of rights guaranteed him by the United States Constitution. His order granted bail to Dr. Sheppard and released him from the Ohio Penitentiary where he had been confined under a life sentence since his conviction in 1954. Ohio was granted 60 days within which to take further action against Dr. Sheppard. *Sheppard v. Maxwell*, 231 F. Supp. 37 (July 15, 1964). This Court has stayed the order fixing such time limitation.
>
> "Sheppard's conviction and the denial of his motion for new trial on grounds of newly discovered evidence were both affirmed on appeal by the Court of Appeals for Cuyahoga County, Ohio. *State v. Sheppard*, 100 Ohio App. 345, 128 NE (2) 471 (1955); *State v. Sheppard*, 100 Ohio App. 399, 128 NE (2) 504 (1955). The Ohio Supreme Court dismissed an appeal from the decision affirming the denial of a new trial

in *State v. Sheppard*, 164 Ohio St. 428, 131 NE (2) 837 (1956), and affirmed the conviction in State v. *Sheppard*, 165 Ohio St. 293, 135 NE (2) 340 (1956), two judges dissenting. Application for certiorari was denied by the United States Supreme Court, *Shepard v. Ohio*, 352 U.S. 910, 1 L. Ed. (2) 119 (1956), and rehearing was denied, *Sheppard v. Ohio*, 352 U.S. 955, 1. L. Ed. (2) 245 (1956). Dr. Sheppard's later petition to the Supreme Court of Ohio for a Writ of habeas corpus was denied, *State, ex rel. Sheppard v. Alvis*, 170 Ohio St., 551, 167 NE (2) 94 (1960). Dr. Sheppard thus has had the benefit of all the processes of law provided by the State of Ohio, and the United States Supreme Court did not see fit to take the case for its review.

"The habeas corpus proceeding here involved was commenced in the United States District Court April 11, 1963, charging, as amended, some 23 separate constitutional defects in Sheppard's conviction. Some of these had already been found without merit by the Ohio Courts and others were new. Indicating his view that there were probably other constitutional imperfections in Dr. Sheppard's trial, the District Judge bottomed his decision on four separate grounds, (1) newspaper publicity before and during the trial denied Sheppard a fair trial, (2) the trial judge should have disqualified himself, (3) evidence that Sheppard had refused to take a lie detector test and that another witness had taken such a test was improperly brought before the jury, and (4) the bailiffs in charge of the jury after the cause was submitted to it improperly allowed individual jurors to make telephone calls to their families. Grounds 1 and 4 were passed upon in the Ohio Court of Appeals and Supreme Court and were found to be without merit. They were also relied upon in the application to the United States Supreme Court for certiorari, which was supported by the same volumes of newspaper publicity as are before us. Ground 2 and part of ground 3 were first asserted in the instant petition for habeas corpus." (Rs. 1-3)

The United States Court of Appeals for the Sixth Circuit felt that the release of petitioner was improvident because the District Court's findings were clearly erroneous and because petitioner had failed to sustain his burden of proof and therefore vacated the order of the District Court and remanded petitioner to the custody of the respondent Warden of the Ohio Penitentiary, Columbus, Ohio, on May 5, 1965. Petitioner filed a motion for rehearing *en banc* on June 11, 1965 and a petition for rehearing on the same day. Both the motion for rehearing *en banc* and the petition for rehearing were denied on July 14, 1965 with one judge dissenting. (Rs. 111-113) On July 26, 1965, the Court of Appeals entered an order staying the mandate and petitioner's petition for writ of certiorari was filed herein on August 24, 1965. The writ of certiorari was granted on November 15, 1965. A motion to dispense with the printing of the record was granted on December 13, 1965.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issues in this case present fundamental questions concerning an accused's right under the due process clause of the Fourteenth Amendment to a trial by a jury composed of fair and impartial jurors in a court room presided over by an equally fair and impartial judge. Basically, the issues presented here may be reduced to two in number. The first concerns the effect of the newspaper publicity upon those above enumerated rights of accused. The second issue relates to the method and standards by which the effect of the newspaper publicity may be deemed to have denied to an accused his right to a fair trial.

There is no question that this case does not present a situation in which actual judge and juror prejudice has been shown to exist. We are here concerned with the question of under what circumstances newspaper publicity may be deemed inherently prejudicial to the accused without a showing by him of any identifiable prejudice and without a showing that the prejudice fatally infected the actual trial.

The District Court in essence found from the volume and nature of the publicity involved such a manifestation of community prejudice against the petitioner that no fair and impartial jury could have been seated at the time and that it was, therefore, a denial of petitioner's constitutional rights to refuse his motions for change of venue and continuances. Respondent maintains first of all that, while extensive and sensational, the newspaper publicity was not so unequivocal as to warrant a finding of pervasive prejudice inherent in its nature. Respondent urges that the determination of the prejudicial or the non-prejudicial nature of the newspaper publicity must be determined from the whole by a searching and detailed analysis

thereof. While not denying that there may be times when a court could reasonably infer from the existence of pre-trial publicity alone, without proceeding to examine voir dire record, the existence of pervasive community prejudice such should only be done when the unequivocal nature is such that the probable effect would be that no reasonable man possessed of the attributes we normally accord to jurors could help but form a fixed opinion of the guilt of the accused. The inquiry in any highly publicized trial should address itself to the probable effect of this newspaper publicity on the jurors who actually sit at the trial of the accused. Absent evidence of obvious community prejudice, the voir dire record continues to afford the best source of evidence relating to juror prejudice or impartiality as well as evidence of some nexus between community prejudice and the trial.

Petitioner has not presented any evidence of community or juror prejudice and the nature and quality of the publicity attendant upon his trial while sensational was not of a character calculated to create fixed and lasting opinions either as to his guilt or innocence. The voir dire record not only indicates a lack of jurors' prejudice but is evidence of a degree of fairness far beyond requirements of constitutional due process. In the light of these considerations petitioner has failed to show in what way he was denied the right to a fair and impartial trial.

Publicity during the trial and alleged prejudicial communications with the jurors have not been shown to have come in contact with the jury; neither are they of such a nature as to be classified as inherently prejudicial.

Other claims of due process deprivation are similarly unfounded in fact and unjustified in assumption. This

case represents but an extreme example of an attempt to establish as fact a constitutionally infirm trial solely on the basis of unwarranted and unjustified presumptions devoid of any evidentiary support. Respondent, therefore, contends that petitioner has failed to sustain his burden of proof and for that reason the decision of the United States Court of Appeals for the Sixth Circuit should be sustained.

ARGUMENT

I. The Sufficiency of the Evidence

By way of introduction, Respondent directs the Court's attention to question number 10 of Petitioner's "QUESTIONS PRESENTED", to-wit: "10. Did the court below improperly foreclose without litigation the question of the sufficiency of the evidence?"

Respondent urges that Petitioner has totally and summarily misstated to the Court that there was not sufficient evidence presented at Petitioner's trial. At page 14 of Petitioner's brief he stated: "There was presented at Dr. Sheppard's trial no sufficient evidence to sustain a conviction, . . .". And at page 61 of his brief states further that:

> "All that was ever proved at trial was that Marilyn Sheppard had been murdered by someone. Any reasonable and objective view of the total circumstances of the case compels the conclusion—reached by Judge Kingsley A. Taft, dissenting in the Ohio Supreme Court (Ra 119a)—that Dr. Sheppard did not kill his wife."

This is just another example of petitioner's attempt to constantly mislead this court.[1] It is apparent that petitioner

1. (Respondent wishes to emphasize before proceeding further that Judge Taft did not say "that Dr. Sheppard did not kill his wife." What Judge Taft did say is that "the state established by its evidence facts and circumstances which cannot be *reconciled* with any *reasonable hypothesis* except that of defendant's innocence." Immediately following that statement Judge Taft pointed out by way of illustration that the only blood found on petitioner's pants was limited to the area around his knee where it supposedly touched the bed when he checked his wife's pulse. Judge Taft concluded that had Sheppard been the murderer, the evidence indicated "without contradiction" that defendant's wife's blood had spirted all over the room and that defendant would therefore have been covered by more blood than was found on him. What Judge Taft failed to consider is the fact that by Sheppard's own story he had laid for almost two hours in the water of Lake Erie. Consequently the absence of blood on Sheppard's clothes *is* reconciled with other evidentially supported hypothesis other than of defendant's innocence. Furthermore, the majority of the Supreme Court of Ohio obviously did not agree.) Ra 119a

attempts to make a constitutional issue out of the sufficiency of the evidence. Thus, respondent urges that a review of the entire trial transcript is necessary to show that this assertion is totally lacking in substance and that petitioner's conviction is not "so totally devoid of evidentiary support" as to constitute a denial of due process. *Garner v. Louisiana, Thompson v. City of Louisville, Hall v. Crouse.* Petitioner's further claim that the Court of Appeals improperly denied him a fair review of this case is, of course, without foundation. Although the District Court did not find it necessary to reach the question of the sufficiency of the evidence, the Court of Appeals did consider the issue and found it to be without merit.

Petitioner has consistently tried to impress on all concerned the innocence of Sam Sheppard and the erroneous assertion that there did not exist legally sufficient evidence to convict. These assertions have implicitly tried to insinuate that Sheppard's conviction was brought about *not* by evidence at trial but by "evidence" in newspapers and only the newspapers, with the effect that *newspaper publicity took the place of a fair trial.* Petitioner would lead this Court to believe that Sheppard was convicted by minimum of evidence which, apparently in his opinion, amounted to nothing, and that he was convicted only as a result of outside publicity and influences, when in fact over the weeks of trial there was expertly presented to the jurors some 31 witnesses for the State of Ohio, 39 witnesses for Petitioner, 96 exhibits offered into evidence by the State, and 175 exhibits offered into evidence by Petitioner. Further, it should not be overlooked that the State's case was presented by three experienced and able assistant county prosecutor's and that the defense was ably conducted by three fully

experienced defense attorneys; the chief defense attorney, Mr. Corrigan, being known as one of the foremost criminal attorneys of the area, all of which can lead to but one conclusion, that this was not such a trial which could justifiably be termed a "mockery of justice", as has been done, but was an expertly handled proceeding with all possible facts being presented to the jury with the end result that Sheppard was found guilty beyond any reasonable doubt, which end result could be, and was rendered by twelve unbiased and unprejudiced jurors.

Respondent will argue the sufficiency of the evidence first, in this brief, to dispel any suspicion that Sheppard was unjustifiably convicted and to demonstrate to the Court that the evidence is an integral part of the background circumstances *against* which the *effect* of publicity must be viewed. Respondent urges the Court that to fully understand *all issues presented* it is necessary to fully read and follow the evidence as it was presented to the jury. To fully grasp this entire situation one must read the whole trial transcript. It can then be seen the evidence legally unfolded and proved that this murder was perpetrated by Sheppard and that his *changed* stories were shown to be at least figments of his imagination.

To assist the Court Respondent's argument on the question of sufficiency of evidence has been divided into four major catagories:

(I) A summary compilation of all statements related by Sheppard prior to commencement of the trial. The statements will be numbered 1 through 8 in order of time given and not in the order as presented to the jury.

(II) A summary compilation of the evidence adduced from the State's witnesses. Each witness generally summarized in the order of appearance, with the exception that Sheppard's statements are not repeated.

(III) Summary of the Defense.

(IV) Conclusion.

(I) STATEMENTS BY SHEPPARD

Statement 1[2]

The first words spoken by Sheppard after the murder were to Bay Village Mayor Houk at slightly before 6:00 A.M., July 4, 1954, the mayor testifying that he received the phone call from Sheppard who announced:

"Come quick, Spen, I think *they* have killed Marilyn."

Thus, we see that the so-called burglar had a companion.

Statement 2[3]

One of the first known accounts of the murder that was presented to the jury was made to Marilyn's father at the hospital. In this account when Sheppard was asked what happened answered:

"They killed Marilyn."

As to whether they were white or negro, he stated he could not tell. Sheppard described the happenings as, that he heard Marilyn screaming; that he had gone upstairs, and when he *reached the top of the stairs* he was knocked out. When he came to, he heard noises, and he said he chased *them*. He said he tried to tackle *them*. Finally, he got to the beach and was knocked out a second time.

The next time Sheppard stated his story, as related to the jury, was in the family hospital where he had been hurridly taken by brother Stephen, both leaving Sheppard's house at approximately 6:10 A.M., July 4th. There were two statements related to two Cleveland, Ohio, homicide detectives who had been called into the case by authority of Mayor Houk shortly after 6:00 A.M., July 4th. The *first visit* by the two officers was in the morning hours and the second during the afternoon; however, between the two visits there had been found in the bushes on the Sheppard

2. Prosecution Witness, TR 2248-2366
3. Prosecution Witness, Tr 4805-4815

property a green cloth bag being about twelve inches long, and containing, what was later identified as Sheppard's property, his wrist watch, ring, key chain and keys. Sheppard was asked if he had ever seen the gren bag before, he stated that it was the bag in which he kept his motor boat tools, the bag containing the tools having been kept in a drawer in the desk of his study.

Statements 3 and 4 [4]

At the first visit, Sheppard related the events of the evening prior; that he had fallen asleep on the day bed in the living room, that he was awakened by what he thought to be his wife *calling*. After being awakened he proceeded up the stairs in the *darkness*, passing the light switch, and as he reached the top of the stairs, he saw a "*white form*" to the rear of or beside his wife's bed. He said he had *contact* with the "intruder", that he *did not know* whether he struggled in the *bedroom* or not, that he felt he was struck from behind . . . and he said he felt it was more of a *Judo punch*. Sheppard went on to relate that when he came to he got into a sitting position, and by the glimmer of a lamp in the dressing room occupied the night before by a friend, Dr. Hoversten, he saw the outline of his badge, which was in his wallet, on the floor, thus, he *picked the wallet up* and placed it in his pocket. He further went on to say that he heard a noise downstairs, proceeded down the steps (again without turning on lights) and saw this form going out the Lake Front door so he took chase. The chase continued down some 57 steps which led to the lake dock, at which point Sheppard stated he *grappled* with the form on the beach and was again rendered unconscious.

There Sheppard lay with, he thinks, feet toward the water and head toward the cliff or lakes edge. It is noted

4. Prosecution Witness, Tr 3550-3766; Prosecution Witness, Tr 4085-4107

that Sheppard had to lay in the water with the waves lashing over him, as he stated, from shortly after the established time of death, between 3:00 and 4:00 A.M., to just prior to the phone call to Mayor Houk, which was slightly before 6:00 A.M.

During the above two referred to conversations on July 4th, the police officers asked various questions, such as, was there one or two men, the answer being *he did not know.* He was asked if he could identify the intruder, and all he could recall was that it was a "*white form*"; asked why, if his wallet was out, did not this person take the $63.00 in cash and the $1,000 check made payable to him . . . *he could not answer.* Sheppard was asked what happened to his T-shirt (which was missing and never found) and he *did not know* what happened to it. Asked during the second visit why the bag with the contents was found where it was, noting that Sheppard did not mention his personal property being missing during the first visit, he related he *did not know, BUT* he stated, someone must have taken the jewelry from him at the time he was unconscious upstairs. Sheppard was asked if he could identify any individual and *he could not*—asked if the person he grappled with on the beach was the same person that he had contact with in Marilyn's room, he stated *he did not know.* Sheppard was further asked to describe the form he struggled with down on the beach and all he could recall *was that he appeared larger than he was, with bushy hair, and in dark clothing.*

The evidence clearly showed to the jury that the wrist watch belonging to Sheppard that had been found in the green bag had very identifiable blood on the band and watch and that there was water on the inside of the crystal. One of the Cleveland police officers' testimony informed the jury that Sheppard gave three different versions as to how the water got under the crystal. First he stated he attended

stock car races two or three days previously and was caught in a drenching rain. Second he related that he inadvertently water-skied with the watch on and third, that on Friday before the murder he was helping his brother with their boat in the lake and brother Stephen shouted to him that his watch was getting wet.

Further, when Sheppard was asked to explain how the *blood* got on his watch he claimed he took his wife's pulse at the neck on *his last visit to the murder room* (just prior to calling Mayor Houk); however, by his own account the watch was gone by this time, since he already stated to the officer that the burglar must have taken the watch when he was unconscious.

Sheppard was asked why he did not flip on the upstairs light when he heard his wife scream and dashed upstairs. He said he did not know why he didn't since the switch was handy and *would not have slowed him down.* (note also, as stated above, he did not flip it on when he dashed downstairs either). A similar type of answer was given when asked why he did not use the telephone which was directly beside Marilyn's bed, noting that Sheppard stated that after his return from the lake he proceeded to examine his wife *again* and after doing so went downstairs to use the phone.

Also, during the July 4th conversations, the officers told Sheppard they had heard that he had been keeping company with a nurse from Bay View (family) hospital, that the nurse had quit and she was now in California, and that while he was in Los Angeles several months ago (March, 1954) and his wife was staying somewhere else (in northern California with friends), he was seeing this nurse. Sheppard stated,"*that is not true.*" Further, it was hinted by Sheppard at this time that his wife, Marilyn, had several

potential lovers and one of these could have murdered his wife in a maniacal act of compulsion.

There was testimony in evidence to show that the authorities after July 4th were unable to talk with Sheppard until July 8th. During this time interval there were numerous contacts made to the Sheppard family and Sheppard's attorneys requesting an interview, the answers usually received ran along the lines of . . . he is under sedation . . . he is . . . and then refer to the injuries that Sheppard claimed he received during his "grappling" with the "intruder."

Finally, on July 8th the County Coroner, Dr. Gerber, and three police officers met at the Sheppard family hospital where Sheppard was being held incognito, at least for the time, and there they conversed with the brothers and father of Sheppard and his attorney, Mr. Corrigan. There was much discussion and finally the Coroner wrote out a subpoena and ordered it served on Sheppard. When the service was about to be accomplished Mr. Corrigan stated one specific police officer could talk with Sheppard.

Statement 5 [5]

The officer testified that the interview was extremely unsatisfactory because during same brother Richard would enter and talk, then brother Stephen would come in and interrupt, and finally father Richard Sr., entered and stated that that was enough, to call it a day as Sheppard was weak now.

However, the officer testified that the substance of the interview was:

> "He was asked to explain what he knew of what happened in his home from the time when he left the Ahern's residence and they had dinner together . . that he became tired and laid down on the couch in the

5. Prosecution Witness, Tr 3824-3921

living room. That he remembered *being awakened* but he did not know the time. He thought that perhaps his wife might have awakened him but he fell asleep again on the couch, and then some period of time after that he thought he heard his *wife scream* and *mention his name, 'Sam.'* (Respondent's note: considering all the statements to this point this is the first time Marilyn is supposed to have called Sheppard's name.) He ran up the stairs and when he reached the top of the *stairs he looked into his wife's bedroom.* That he observed some form *stooping over his wife's bed,* and as he was about to *enter he was suddenly struck from behind,* then fell to the floor."

The officer responded to a further question:

"I asked him if he could give me a meager, if not a good description of the intruder he saw stooping over the bed. His reply was that *it was taller than he, had a white top,* and *he thought he had bushy hair.* I asked him if he thought that was the same one that he saw going through the front door, he said he *didn't know.* I asked him about whether or not he had made any enemies during the time he had been out there, if he knew someone that may have had a reason to destroy him or some member of his family over his profession. He said he didn't know of that time but he might have had three or four. That his wife may have had some admirers. I asked him about how many. He said probably three or four. I asked him if he ever talked to these admirers, if he ever objected to it. He said no, he was rather impressed with the fact that his wife did have a lot of admirers. He said he knew of no reason why anyone would take his life."

After an entire reading of the trial transcript there is not one iota of evidence to show that Marilyn had any admirers, with the exception of Sheppard's testimony, in fact, the evidence tended to show exactly the opposite, namely, to the effect that she was a good wife and mother and that she was of the highest caliber and character.

Statement 6 [6]

On July 10, 1954, there was a written signed statement taken from Sheppard . . . being given in the presence of police officers and Sheppard's attorney. This statement was submitted in its entirety to the jury and there were some very noted additions and changes when compared with Sheppard's prior admissions and statements.

At the outset of this statement there was a somewhat rambling resume of the evening before the murder wherein it was described how the Sheppard and their friends the Aherns met and had dinner along with the total of three children. Sheppard mentioned how they had a few drinks, then later dinner was prepared and they ate on the lake side porch . . . mentioning how it was "*quite breezy*", the wind coming from the north generally, and that jackets and sweaters were necessary. He mentioned it was then he placed his brown corduroy jacket on. (the same jacket found folded and undisturbed on the end of the bed which he later went to sleep on.)

Sheppard went on to say that the television was on and they watched a movie, as well as listening to a baseball game on the radio. Further, as to the evening before, he remembers dozing off to sleep and then that, "my wife partially awoke me in some manner and I think she notified me that *she was going to bed.*" The next he recalled was that he thought that Marilyn *cried or screamed out.*

> "that he *thought* she 'cried or screamed my name once or twice,' at which time he ran upstairs. Sheppard continued . . . "I *charged into our room* and saw a form with a light garment, I believe. At that time—at the same time—*grappling with something or someone.* During this short period I could hear loud moans or groaning sounds and noises. I was struck down. It seemed that I was hit from behind somehow but had grappled this individual from in front or generally in

6. Prosecution Witness, Tr 3550-3766 (typed transcript page numbers 2013-2038)

front of me. I was apparently knocked out. The next thing I knew I was gathering my senses while coming to a sitting position *next to the bed, my feet toward the* hallway."

Continuing: . . .

"In the dim light I began to come to my senses and recognized a slight reflection on a badge that I have on my wallet. . . . I looked at my wife, I *believe* I took her pulse and *felt* that she was gone."

Sheppard then relates how he *believes* he ran into his son's room and then heard a noise downstairs and ran down. Note that there was no mention of even an attempt to make a phone call from the phone not more than three feet away and not turning on any lights.

Sheppard then recited, after running downstairs that:

"I then saw a '*form*' progressing rapidly somewhere between the front door toward the lake and the screen door, or possibly slightly beyond the screen door. I pursued this form through the front door, over the porch and out the screen door. All of the doors were *evidently* open, down the steps to the beach house landing and then on down the steps to the beach, where I *lunged* or *jumped* and grasped him in some manner from the back, either body or leg, it was something solid. *However, I am not sure.* This was beyond the steps an *unknown* distance but probably about ten feet. I had the feeling of twisting or choking and this terminated my conciousness."

Sheppard described how he awoke at the water's edge,

"on my face, being wallowed back and forth by the waves,"

and how he regained his senses and went to the house where:

"I went back upstairs and looked at my wife and *felt her* and *checked her pulse on her neck* and *determined* or *thought* that she was gone.".

He then went back downstairs and called Mayor Houk, and just prior to or just after their arrival (6:00 A.M.) is the first he noticed any alleged injury to himself, stating,

> "The injury to my neck is the only severe pain that I can recall. *I should say, the discomfort in my neck*".

He then describes the short time period from the arrival of the Houks to the time when brother Stephen rushed him to the car and drove 60-70 miles per hour to the family hospital (the time period being some 10 minutes). It is interesting to note that with three doctors present and being so obvious that Marilyn was dead that no one suggested to use the awaiting ambulance, if Sheppard actually did have injuries.

It was read to the jury Sheppard's version of the interviews by authorities and the showing of the articles from the mentioned green bag . . . also the relation of how the water got under the crystal (the three stories). Sheppard went on about his courtship of Marilyn and the first few years of their marriage . . . at which time he seemed to be implying that Marilyn had at first been "quite jealous" of his work and the fact that his work required him to come in contact "with many women, both patients and fellow workers". Then there were specific questions asked regarding Marilyn having accused him in the past of affairs with other women, and Sheppard answered,

> "She indirectly may have in questioning me about my whereabouts at various times . . .".

There were direct questions and answers related to the jury as to Sheppard's affairs with Miss Susan Hayes, which showed that she had been employed at the family hospital and that he would not call it an affair that he had had with her but,

> "*we have been good friends for some time*".

When asked if he socialized a lot with her he answered,

> "In the hospital, yes. I wouldn't call it socialized. We talked, we became *good friends* . . . Q. Nothing more than good friends? . . . A. No.".

Sheppard admitted that when he was in Los Angeles in March of 1954 he did purchase her (Susan Hayes) a new wrist watch because she had lost hers.

There were further questions as to another lady who was married to the salesman that sold Sheppard his Jaguar Sport car. Sheppard answered that he had become "very well acquainted with her" but *denied that it developed into a love affair*; however, he did admit that after a marital discussion with Marilyn, himself, the salesman and his wife, that he and Marilyn decided that it would be best not to socialize with them any longer. Finally Sheppard stated that he knew that Marilyn had been informed of the "rumor" concerning this lady and himself and he agreed that the social contacts should be minimized.

Sheppard was asked if he knew of any reason why someone would want to murder his wife he answered,

> "Well, I don't know but I have heard of individuals who are maniacal enough that when they start something, an act like that, it becomes a compulsion, a means of satisfaction like the ordinary man has from an orgasm or something of that nature. She has spurned lovers, potential lovers. Q. How many of those potential lovers did she have? A. Three that I know of and I am pretty sure, more. I am certain that there were more."

(Note: if there were any such so called spurned lovers there was absolutely no showing of such to the jury).

Upon further questions regarding the *entering of the murdered woman's bedroom* it is clear at this time that *Sheppard is claiming to have entered the room and grappled with someone* . . .

"I don't recall seeing anything from the head of the stairs, it happened so rapidly, it must have been when I entered the room and I don't know whether they were standing or stooping",

and later he answered to another question,

"Because as I told you, I seemed to be immediately engaged in grappling with someone." and "I don't recall holding any portion of the body in the bedroom.".

Finally, when asked the condition of the beach and lake when he chased the form down the steps, Sheppard described the beach as "firm, as though it had been washed over and packed somewhat". As to the condition of the lake he stated that it was somewhat windy and,

"The waves were moderately high, I'll say too high to water ski and not too high to fish, not real high but moderately high".

Statement 7[7]

(Sworn Testimony at Coroner's Inquest)

The next time Sheppard spoke out was at the Coroner's Inquest held July 18, the statements of Sheppard being related to the jury by Coroner Gerber. When Sheppard was asked to describe this murderous burglar he said that he rushed after this form and that he could not tell definitely what this form was, that he *could not tell* whether it was a,

"human being or whether it was a man or woman, whether or not it had a hat on, whether or not he could see any hair, whether or not it had a coat or trousers on".

Sheppard further testified at the inquest that when he came into the bedroom the *last* time he took Marilyn's pulse at the neck (Sheppard wears his watch on his left hand). It should be mentioned that there was evidence at the trial

7. Prosecution Witness, Tr 2956-3549

that Sheppard's trousers had blood on the knee and that prior to the inquest he had told police that the spot on the knee and the blood on his wrist watch must have gotten on at the time he took Marilyn's pulse during his last visit to the bedroom.

Sheppard was asked about his dog (testimony before the jury that the Sheppard house dog never barked), about his brown corduroy coat (the coat having been found neatly folded at the end of the day bed on which Sheppard was sleeping) and about the T-shirt which he had been wearing and was missing . . . his response to all questions being *that he could not remember anything at all about these items.*

Sheppard was quizzed as to whether there were any difficulties in his marital life and at another point whether or not there had been any *question of divorce* between him and his wife and he answered *"NO"* to both.

In response to questioning concerning a young lady living in California by the name of Susan Hayes he stated he knew her and when asked if on his recent trip to Los Angeles he *did or did not live in the same bedroom with her* at a doctor friend's house, he answered *"NO"*.

Statement 8 [8]

A final interview was given to authorities on July 31, 1954, when he was asked about Susan Hayes and he said that *he had lied about her*, and that he did stay with her at a doctor friend's house in Los Angeles. He stated that he had told his wife about Susan Hayes before somebody else would tell her. He was asked about other affairs, if he told his wife about,

> "other *affairs* he was having with women, he said, yes, he always told her about that. We asked him why. He said because he didn't want her to get the wrong

8. Prosecution Witness, Tr 3550-3766

impression in case somebody else told her about those *affairs.*".

This concludes the resume of the State's evidence relating to Sheppard's statements prior to trial, thus, by way of summary what had the jury heard without considering any other portion of the balance of the State's case. They saw that at first there was more than one intruder which later merged into one . . . that while asleep he was awakened by his wife's screams, later changed to calling his name and finally cried and screamed and called his name once or twice.

As to the intruder, at first it was just a "white form", later being seen to have white from the waist up and still later termed to have on light garments. The form that he chased out of the house had dark clothes on yet he stated that he could not tell if the form was human or not, man or woman, had a hat on, coat or trousers and could not describe "its" hair; however, he later stated the form was taller than he, had a white top on and had bushy hair, the bushy hair description also fitting the person with whom he grappled on the beach.

He has told the jury first that when he arrived at the top of the stairs he was knocked unconscious by a judo blow from the rear, then it changed that he was suddenly struck from behind as he entered the bedroom. Later he struggled and grappled in the bedroom where he was then struck from the rear and fell to the bedroom floor next to the bed . . . yet prior to the last statement Sheppard said he did not know if he struggled in the room or not.

Concluding further from all statements the jury heard, Sheppard was awakened by some cry but not sure if cries, the call of names or what; that he ran upstairs in darkness and was hit, but knows not when as he does not obviously remember if he struggled or not, if he was rendered un-

conscious on the hall floor or bedroom floor, or how long he was there. He is also not sure if he examined Marilyn after he awoke at this point, and whether he did or didn't check his unawakened son.

The jury could quickly conclude that there is no answer to what was in the room . . . as many times as this changed Sheppard could have been struggling with a "yellow ape", if there was a struggle, which certainly could not be concluded from Sheppard's descriptions.

Sheppard says he heard noises downstairs, but called no one from the bedroom phone . . . so he ran down again in darkness and chased something or someone maybe from the front room out the door and across the porch and down the steps or maybe just across the porch and down the steps or maybe just down the steps . . . he is not sure. Also, the outside door and screen door might have been standing open or again they might have been shut . . . you could not conclude.

Then there is the beach incident . . . This "thing" might have been the form that was in the bedroom but then again Sheppard could not say. Possibly he had bushy hair, yet if it was the same form sometimes it had bushy hair and other times he could not see its hair. On the beach it could have had dark attire on . . . or maybe dark or white.

On the way to the beach Sheppard possibly tried to tackle the object, or something . . . he was not sure. He thinks he grappled with it, well, anyway he said he was rendered unconscious.

There are other observations, Sheppard lay face down on a practically non-existent beach with the waves lashing over him and wallowing him around for possibly two hours and did not regain consciousness and did not drown. Also the family pet did not bark through the entire episode nor did the Sheppards' son awaken until the next morning. The

jury is to believe that the watch he wore was stolen by the burglar during the time that he was first knocked out in the bedroom, yet, by his own statements he felt the pulse of Marilyn the second time he went into her room, which explained how the blood got on the watch, and proceeded to touch her neck . . . the watch had to be gone. The jury is also to believe that Sheppard on three different occasions, days prior to the murder, soaked his watch and then walked around for some lengthy period of time with water under the crystal . . . when the logical conclusion is that when Sheppard entered the water to clean himself off he soaked the watch.

The jury is expected to believe that this "intruder" literally beat Marilyn 35 times, then grappled or struggled with Sheppard and never used the lethal weapon on him, which the intruder allegedly had to carry with him as it was never located.

The panel was to believe that Sheppard was a dutiful and faithful husband . . . yet by his own words he lied under oath regarding affairs he had had with other women.

(II) EVIDENCE ADDUCED FROM STATE'S WITNESSES

The State of Ohio started the presentation of the case with a showing that murder had been committed and what the cause of death was. Dr. Lester Adelson [9] of the County Coroner's office testified as to the viciousnes of the attacker when he showed pictures and described the some 35 mortal head injuries. He testified that there was no evidence of sperm in or around the body of Marilyn Sheppard. One other evidentiary matter testified to by Dr. Adelson pertained to two chips of teeth found under the body of Marilyn . . . testimony being unrefuted that the chips came from

9. Prosecution Witness, Tr 1675-2015

teeth of hers and pictures were exhibited to show how the chips fit into the broken teeth.

The prosecution proceeded, after the crime of murder had been established, to relate to the jury the events of the evening before, July 3rd, when the Don Ahern's were over for dinner. Mr. Ahern[10] testified as to how the Sheppards were at his house before going to Sheppards for dinner . . . as to the drinks they had . . . that Sheppard left for a short while to go to the hospital. Testimony was offered that Mr. Ahern and Sheppard took a walk near the lake and there was discussion as to how rough it was with the waves, every second or third one, covering the entire narrow beach and hitting the cliff like wall. After dinner the three children were put to bed in their respective homes (Aherns having two children) and the adults then proceeded to watch the television movie, Sheppard also listening to portions of a baseball game on radio. Testimony indicated that Sheppard reclined on the day bed wearing his cord trousers, white T-shirt, brown corduroy jacket and shoes, where he went to sleep. The last time the Ahern's saw Sheppard that evening and Marilyn alive, was at the conclusion of the movie between 12 mid-night and 12:30 A.M., when they bid Marilyn good-night and left . . . Sheppard not being wakened by their departure.

Nancy Ahern[11] testified, in addition to the events of the evening of July 3rd., that she had had conversations with Marilyn regarding the Sheppard's domestic problems sometime in April, 1954, after the Sheppard's return from their trip to California. Marilyn mentioned the Susan Hayes girl and that she found out Sheppard had purchased her a wrist watch, having discovered this fact by seeing an expense check Sheppard had signed. It is interesting to note that

10. Prosecution Witness, Tr 2016-2127
11. Prosecution Witness, Tr 2128-2247

Sheppard testified that *he voluntarily* told Marilyn about the affairs with Miss Hayes . . . apparently, as he stated it, "because he didn't want her to get the wrong impression in case somebody else told her about those affairs". Nancy Ahern replied to direct questioning by defense attorney, Mr. Corrigan, as to her impressions concerning the love between the Sheppards,

> "Mrs. Sheppard . . . seemed . . . very much . . . in love. I was never quite sure about Dr. Sheppard".

Mayor J. Spencer Houk[12] was the first known person to receive word that Marilyn had been murdered when he answered his home phone shortly before 6 A.M. July 4th . . . the spoken words being,

> "Come quick, Spen, I think they have killed Marilyn".

Mayor Houk testified that he and his wife immediately proceeded to Sheppard's house, had a few words with Sheppard, looked at Marilyn and then called the police and brothers Stephen and Richard. After the arrival of Bay Village police Chief Eaton, he and Mayor Houk performed certain inspections around the house and along the beach and both concluded that the case was too big for them to handle. Thus, the Mayor authorized Chief Eaton to call the Cleveland authorities for assistance, which was done. Sheppard's friend, Mayor Houk, continued by telling the jury that Sheppard had come to his office where the two had a conversation in which the Mayor suggested to Sheppard that if he (Sheppard) had done this (murder) that it would be best to come out and admit it, that everyone would still stand behind him. Sheppard replied that he had not done it and reminded the Mayor that he was a suspect himself . . . the Mayor responding that this did not surprise him

12. Prosecution Witness, Tr 2248-2366

since he had previously learned that Sheppard was the one who had mentioned his name.

Following Mayor Houk to the stand was his wife Esther.[13] She testified she had gone to bed at about 3 A.M. July 4th. (Houks live just a short distance from the Sheppards) and then she related the events as they occured after their arrival at the Sheppard house as follows: When they arrived Sheppard was slumped in a den chair with no shirt on, he had cord trousers on, and noting that there was a large spot of blood on one knee. She further testified that she offered Sheppard a drink of whiskey which he refused stating:

"I can't think clearly now, and I have to think", when this offer was made she touched his shoulders and they were dry. Mrs. Houk described the Sheppard's dog as being in the house when they arrived and either went out when they came in or when the door was opened later to let someone in. Mrs. Houk related a conversation she had been involved in with her mother and Sheppard, the conversation being over possible injuries her mother had received in an automobile accident. Sheppard said in response to questioning during this conversation that a head injury was easy to pretend even though there was none there and as a doctor he knew that this could not be traced. When questioned about any known disagreements between Sheppard and Marilyn, Mrs. Houk stated that they disagreed on quite a lot of things, quite often over the cars that Sheppard continualy purchased, particularly over an MG that he brought home and that she did not like the Lincoln Continental. Also Marilyn wanted to buy more furniture and apparently had been unsuccessful. She testified that one time when Shepard was in Boston, Marilyn purchased a dishwasher which greatly displeased Sheppard upon his return.

13. Prosecution Witness, Tr 2367-2479

Bay Village patrolman Fred F. Drenkhan[14] testified that he and his partner had been on duty the night of the murder and that they had passed Sheppard's house five or six times that night and saw or noted nothing unusual. That at about 2 A.M. July 4th he conversed with his partner that there was a very high wind from the north and that the lake was very rough. The significance of the latter being that if the lake was rough as described by several witnesses it would cover the beach that had existed in front of the Sheppard house. Officer Drenkhan described how Mayor Houk had phoned the police at 5:57 A.M. and that after his arrival at Sheppard's house he was proceeding upstairs when he noticed Sheppard's *corduroy jacket neatly folded at the foot of the day bed where Sheppard had been sleeping.* Upstairs he noted that there was a phone directly beside Marilyn's bed and that *all physical evidence in the bedroom showed that there had not been a struggle in the room.* (There was a distance of three feet between Marilyn's bed and the blood spattered wall, the area where Sheppard claimed he fought, yet the blood was not smeared in the slightest). Further Officer Drenkhan testified that after an examination of the doors, windows, etc. there was *no evidence of any forceable entry,* that Sheppard's medical bag was turned over yet the *side enclosures had not been opened* and that downstairs three drawers were removed from the desk and *piled neatly one on top* of the other and had not been spilled.

Bay Village Police Chief Eaton[15] related how he examined the entire house for some *evidence of forceable entry and could find none,* and described how he had men search for the missing murder weapon, which included the use of a mine detector and skin divers, among other things, and the

14. Prosecution Witness, Tr 2479-2790
15. Prosecution Witness, Tr 2791-2906

they found absolutely nothing. Chief Eaton told how, after a search of the house, they found a $20 bill, a $10 bill and two $1 bills in a copper mug; a silver dollar, five fifty-cent pieces, two quarters and a nickel in the drawer of a dressing table in the guest room; four $20 bills and two $10 bills in a desk secretary in the downstairs *DESK*; a $20 bill and two twenty-five cent pieces in a chest of drawers in a room next to the east room (the dressing room); as well as $63 and a $1000 check in Sheppard's wallet.

The son of Mayor Houk[16] testified that during the day of July 4th he found the mentioned green bag in the bushes about half way down the embankment leading to the lake dock . . . that the bag contained Sheppard's watch, ring, keychain and keys.

County Coroner Samuel Robert Gerber[17] was on the stand for several days and even though the defense tried under very grueling cross examination to shake some very damaging testimony it could not be done. In addition to testimony of statements of Sheppard related to Dr. Gerber and sworn statements made during the inquest, he testified to many important facts, among which was the introduction into evidence of the pillow slip that had been on Marilyn's bed the night of the murder which showed a bloody imprint on it. This bloody imprint was described by Dr. Gerber as a two bladed instrument, the blades on each side being about three inches long, and two blades together at its widest part, measuring about two and three-quarters inches, . . . that there was a toothlike indentation at the end of each blade. When asked by direct questioning what type of instrument it could have been, Dr. Gerber rendered his opinion that it was an instrument . . . a surgical instrument; however, he did not exclude the possibility that it could have

16. Prosecution Witness, Tr 2907-2955
17. Prosecution Witness, Tr 2956-3549, 4785

been some other type of instrument. Dr. Gerber's examination switched to Marilyn's watch which was found on the den floor downstairs. There was evidence that the watch was *directly beside the tools* which, by Sheppard's statements, must have been removed from the green bag, the bag being kept and last seen by Sheppard in his desk drawer. Testimony revealed that there was blood found on the face of the watch, band and band connection. Dr. Gerber identified an exhibit which was a photograph of Marilyn's left hand and wrist which showed a *blood impression of where the watch had been on her wrist*; thus, the watch was there long enough for the *blood to totally dry and then was removed* and, for some strange reason, deposited on the floor downstairs. Testimony proceeded to describe the *rings that were on the fingers of Marilyn* when she was first observed by Dr. Gerber. Dr. Gerber set the time of death at between 3 and 4 A.M. which compared with the estimated time set by brother Richard. The Coroner stated that he observed throughout the house *what he thought to be a trail of blood* extending from the murder room, down the stairs, through the house and into the basement, thus he called in his Senior Technologist to check all spots.

Cleveland Detective Robert Schottke[18] followed Dr. Gerber to the stand and much of his testimony consisted of a description of the murder scene at the time he and his partner arrived sometime after 8:30 A.M. July 4th. There was a full reiteration of the many conversations he had had with Sheppard and the many pieces of evidence that he was able to gather.

Dr. Lester T. Hoverster[19] was a friend of Sheppard and Marilyn for some number of years and had been their

18. Prosecution Witness, Tr 3550-3766
19. Prosecution Witness, Tr 3767-3823

house guest for a few days prior to July 3rd when he left to visit another friend in Ohio. Dr. Hoversten testified that he had had several conversations with Sheppard from the year 1950 up to the time of the murder concerning the Sheppard's marital situation, the first being during the year 1950 when they all lived in California and Marilyn had traveled to Ohio for a vacation. During this conversation Sheppard presented to Dr. Hoversten a *letter he* (Sheppard) had written to Marilyn and intended to send to her wherein Sheppard described how he felt about their marriage and *that he wanted to consider the possibility of a divorce.* At this time Dr. Hoversten was asked what his advice would be on the matter and he suggested Sheppard not send the letter but to wait *until Sheppard could speak to her* in person. Dr. Hoversten said that a short time after this conversation Sheppard again came to him and that he *had had a call from his father concerning the divorce* situation and that apparently *father* talked him out of it at that time. The last conversation Dr. Hoversten had with Sheppard regarding his domestic problems was in the Spring of 1953 when it came up again about the *possibility of divorce* and Sheppard was asked if he had *talked to his parents* and he stated either that he had or he intended to. Dr. Hoversten testified about his visit with Shep[illegible]rd at the hospital shortly after the murder. Testimony revealed that he was in Sheppard's room when *brother Stephen* entered and *became quite upset to find a visitor,* whereupon the doctor was asked how he got in and was *told to leave,* however, before leaving the hospital Stephen approched him and they both *re-entered* Sheppard's room. After their return Dr. Hoversten was asked whether Stephen said anything to Sheppard and the doctor replied,

"Yes, I remember I was sitting on the left hand side of the bed, and Steve sat near the foot of the

bed. As I recall, Dr. Steve addressed Dr. Sam and said in words to this effect 'you should review in your mind several times a day the sequence of events as they happened so that you will have your stories straight when questioned' and then he gave as an example, 'you were upstairs, you went downstairs, and from here to there' and so forth.".

Following Dr. Hoversten Deputy Sheriff Carl Rossbach[20] testified, his testimony herein previously mentioned. Following was a village fireman[21] and policeman[22] who were at the scene of the crime early the morning of the 4th. Also there was testimony by an employee[23] of the Coroner's office which related *that three rings were taken from the fingers of the murdered Marilyn.*

Mrs. Elnora Helms,[24] called by the State, related how she had done housework once a week for the Sheppards since February of 1952. She testified that in the company of the authorities she inspected the house and particularly Marilyn's bedroom and *could find nothing missing.* Mrs. Helm stated that the Shepards had always occupied a bedroom in the house containing a double bed until about two weeks after their return from California in March, *at which time they moved to the murder room which contained twin beds.*

Cleveland Detective Michael J. Grabowski,[25] a member of the police fingerprint unit, related how the *house was dusted for fingerprints.* He testified he dusted the downstairs areas that had allegedly been disturbed by the "burglar". He examined the overturned doctor's bag in

20. Prosecution Witness, Tr 3824-3921
22. Prosecution Witness, Tr. 3953-3976
21. Prosecution Witness, Tr 3931-3952
23. Prosecution Witness, Tr 3922-3930
24. Prosecution Witness, Tr 3977-4004
25. Prosecution Witness, Tr 4005-4084

the hallway, the doors, windows, furniture of the living room and Sheppard's den, the surfaces of the front and sides of the desk, front of the drawers of the living room desk, front and back of the drop-leaf table, and some of the articles that were on top of the desk, two pictures, and a glass container full of pennies. Grabowski went on to state that he also dusted some letters that he picked up from the floor which he thought might contain some fingerprints. As a result of this Grabowski found *NO FINGERPRINTS WHATSOEVER DOWNSTAIRS,* but he did find some peculiar lines on the items he examined. To him it seemed as though someone had wiped away all prints with rough material—a towel, perhaps, or something resembling sandpaper. Officer Grabowski related how he took photographs and dusted the windows for fingerprints in the murder room *and found none.* However, he did find fingerprints of the occupants of the other rooms upstairs. He found that the alleged "burglar" had not ransacked the upstairs rooms and that the fingerprint powder where used upstairs, turned up none of the peculiar wipe-off lines. Officer Grabowski stated he found *ONE latent print in the murder room,* it being found on the headboard of Marilyn's bed. He stated that he lifted this print and after comparisons found that it was the left thumbprint of Sheppard.

The State produced a Bay Village housewife by the name of Mrs. Doris Bender[26] who lived within one-quarter of a mile of the Sheppards. Mrs. Bender testified that she and her husband were returning home and passed the Sheppard house at approximately 2:15 the morning of July 4th. She continued, and could not be prodded into changing any detail of her statement under vigorous cross examination, that there were *LIGHTS BURNING in an upstairs room and DOWNSTAIRS in the eastern section*

26. Prosecution Witness, Tr 4172-4195

of the Sheppard house. The significance of this testimony is that Sheppard in *ALL of his various accounts* of the events of the murder had stated that *at no time did he ever turn a light on,* and that *all of his "dashing" around was done in total darkness* . . . further that he was asleep until *AFTER* Marilyn had been beaten, yet by the testimony of Mrs. Bender, *there were lights burning on BOTH floors of the house* just prior to the unrefuted established time of death, between 3 and 4 A.M.

The State called witnesses[27] to show that there were three teen-aged boys along the beach some distance down from Sheppard's about 1 A.M. July 4th, and they saw nothing unusual in the area.

A fisherman[28] testified that he was on a pier near Sheppards until 1:30 A.M. The testimony was that he saw nothing unusual in the area but that the *weather got so bad by 1:30 A.M.* that he *had to stop fishing.* He said the wind was coming in from the *northwest* and the *waves must have been coming up 30 to 40 feet on the beach.*

Officer Henry E. Dombrowski[29] of the police scientific identification unit testified that he *located spots of blood throughout the house.* He described how he tested the various blood drippings and found that there was a *positive reaction for human blood* various places in the *stairway* between the first and second floor, on the *steps* of the landing on the kitchen stairs and on the basement stairs.

Miss Mary Cowan,[30] senior technologist in the County Coroner's office, was called to the stand by the State regarding her examination of the house and various objects

27. Prosecution Witness, Tr 4202-4211; Prosecution Witness, Tr 4212-4234
28. Prosecution Witness, Tr 4196-4203
29. Prosecution Witness, Tr 4234-4258
30. Prosecution Witness, Tr 4616-4804

offered into evidence. She stated that she *found blood stains* on the front porch in front of the living room door as well as *other places* throughout the house such as on the basement steps. She continued to testify that she examined Sheppard's watch, ring and key chain that were found in the green bag. She stated that after examination *there were no fingerprints on any of the objects* but that there was *CRUSTED BLOOD on the watch* itself and in the *crevices of the wrist band,* as well as *moisture under the crystal.* After a thorough examination of the green bag itself there was *NO blood of any kind to be found on the INSIDE or OUTSIDE of said bag.* Thus, it can be concluded that the blood on the watch was allowed to totally dry before being placed in the bag, and that the person so placing the articles in the bag had no *wet* blood on his hands when so doing. Miss Cowan said that she examined the six by six and one-half inch spot on the left leg of Sheppard's trousers and found that the spot tested *positive* for human blood, although it had been *diluted with lake water.* She noted that the blood stain was twenty inches from the bottom cuff and that the measurement from the floor to the top of the mattress on which Marilyn was murdered, was twenty-four inches.

Dr. Richard Hexter,[31] a medical doctor, had been called by Police Chief Eaton to examine Sheppard at the family hospital. This the doctor did at 3 P.M. July 4th. The reason for this request was to attempt to verify, if possible, *claimed injuries* received by Sheppard during the alleged struggle with the "intruder". Dr. Hexter testified that he found *very slight injuries,* particularly a blackened eye, but that he *could NOT find neck* injuries as described by osteopathic brother, Stephen.

31. Prosecution Witness, Tr 4436-4615

The State called Thomas R. Weigle[32] who was a first cousin of Marilyn and had known Sheppard twelve years. This witness was obviously called to refute the defense claimed allegation that Sheppard was a calm even tempered individual. He described how he and his wife were visiting the Sheppards on a Sunday during the latter part of March, 1952. Mr. Weigle continued that the television was on as he and Sheppard sat in the living room prior to dinner, when little Chip, the son of the Sheppards, playfully slapped Sheppard's arm. With this Sheppard

> ". . . became in a rage, he seemed suddenly to go into a rage, became very red in the face, and landed a number of blows. Chip immediately began screaming and crying, . . Well, he landed repeatedly a number of blows, and at the time he began yelling himself, that is, Sam, and he yelled very loudly, 'Don't do that. Don't hit me again.'"

Mr. Weigle stated that he then stood up and made the statement,

> "For God's sake, Sam, take it easy",

and then left the room. After leaving the room he said,

> ". . . In fact, I could still hear it. I could still hear some blows being landed, and I could hear yelling going on. As I walked in the kitchen I could hear Sam yell and order Chip to go upstairs without any supper.".

The final witness to take the stand for the prosecution was Miss Susan Hayes,[33] then residing in California. She related that she had been employed in the family Bay View Hospital during part of the year 1951 to December, 1952, when she resigned to take other employment in the city of Cleveland. She resumed her employment as a technician at Bay View in August, 1953, resigning again in February,

32. Prosecution Witness, Tr 4816-4829
33. Prosecution Witness, Tr 4030 et seq.

1954, to move to California. The reason this witness was called was to very pointedly show that *Sheppard*, while under oath at the inquest, *had lied* concerning his relations with Miss Hayes. Miss Hayes testified, contrary to Sheppard's sworn testimony and other statements, that their relationship was far beyond that of just being "friends", as Sheppard put it. She related that they had had intimate sexual relations during both of her employment tenures at the hospital, such relations taking place both in Sheppard's automobile and in an apartment above the Sheppard Clinic. Also that she would see Sheppard at least every Friday during the time that she lived in Cleveland between her two employments at the family hospital. She described how they had lived together (using the same bedroom) at a friends residence in Los Angeles during Sheppard's visit there in March, 1954 while Marilyn visited friends in northern California during this time period. She stated that Sheppard *had given her presents,* particularly *a watch and a ring,* and that he had on various occasions *expressed his love for her.* Miss Hayes described how Sheppard expressed his *love* for her in January, 1954, at her home when he gave her the ring. Concerning the question of *divorce between Marilyn and Sheppard,* Miss Hayes said *that she and Sheppard had had conversations about it,* one being in 1953, Miss Hayes stating,

> "Well, I remember him saying that he loved his wife very much, but not so much as a wife. He was thinking of getting a divorce, but he wasn't sure his father would approve.".

On another occasion she related that Sheppard and she were talking and that

> ". . . he said that he had talked—mentioned to his wife something about divorce.".

Miss Hayes testified that after Sheppard's return from California in 1954, they *corresponded by letter,* her letters being sent to the hospital.

Thus, the State of Ohio rested their case against Sheppard.

(III) SUMMARY OF THE DEFENSE

The defense consisted of, as previously mentioned, some thirty-nine witnesses, by far the majority of which were either character witnesses, witnesses as to the alleged injuries of Sheppard, witnesses as to his actions in the family hospital during his confinement after the murder, or a combination of the above. The essence of these witnesses was to either say that he was a nice individual or that there was some claim to his alleged injuries. It is urged by Respondent that these witnesses added nothing material to the defense other than placing Sheppard's character in evidence, thus, there is no necessity to ponder their testimony here. It is obvious that the jury had to decide the guilt or innocence of Sheppard for the crime of *MURDER* and not whether he was liked by his associates.

As to the medical testimony regarding Sheppard's injuries, Respondent urges that this was not a real issue in the case. There seemed to be no doubt that Sheppard did have some injuries, and this fact was really never disputed by the prosecution. The only issue that became important in the case was, not the extent of the injuries, but how they were received. Through the trial of the MURDER the defense attempted to show that such injuries were received by a "struggle" with an alleged "intruder", while the prosecution continually hammered away at the fact that the alleged injuries were received as a result of some frenzied accident after the murder, such as falling down the 57 steps leading to the lake which Sheppard possibly was running down in order that he could dive into the lake in a vain attempt to wash the inevitable tell-tale blood from his clothing and body.

Brother, Dr. Stephen Sheppard[34] was called as the first defense witness. He testified as to Sheppard's tempera-

34. Defense Witness, Tr 5013-5594

ment, his viewing of the body of Marilyn, the murder house and the rushing of Sheppard to the family hospital by the use of Dr. Stephen Sheppard's automobile, not using the available ambulance. There was considerable examination and cross examination regarding the alleged injuries of Shepard. Dr. Stephen Shepard became very rattled at one point during cross examination regarding the injuries and finally admitted that what he had testified to earlier probably was not the truth. He was examined as to his prior statements that Sheppard had a broken neck, and upon cross it became evident that this was merely a statement and probably not the truth. Dr. Stephen Sheppard testified that he had had a discussion with Marilyn on August 10, 1950, concerning the possibility of divorce between she and Sheppard. Also that Dr. Stephen Sheppard had discussed this conversation with Sheppard a short time thereafter.

Brother, Dr. Richard Sheppard[35] testified that he had known of certain difficulties between Marilyn and Sheppard . . . stating that he felt that Marilyn was "a bit jealous of Sam's profession". He stated that Marilyn had discussed with his wife that while Sheppard was in California in 1950 and Marilyn was in Cleveland, he (Sheppard) wrote to her that he had taken a date to a school dance. Also, Dr. Richard Sheppard stated that he knew Sheppard was unhappy when Marilyn purchased a new sink unit and disposal and had them installed when he (Sheppard) was in Boston.

There was an individual called as a defense witness by the name of Leo Stawicki,[36] a steel worker, who testified that he had passed the Sheppard house about 2:15 or 2:30 the morning of July 4th. He stated that he observed, by the lights of his car, a man, as he described, who had a long

35. Defense Witness, Tr 5634-5751
36. Defense Witness, Tr 6022-6061

face and bushy hair. The defense quickly questioned the reliability of this witness when he admitted that he did not know where Sheppard lived when he drove along the street Sheppard lived on and that he had read in the newspaper the advertisement concerning a $10,000 reward for information leading to the arrest and conviction of the murderer of Marilyn Sheppard, the advertisement having been placed in the newspapers by the Sheppard family July 9, 1954. The witness stated that he read this in the paper July 9th and reported the so called bushy haired man to the authorities July 10th.

Bay Village Police Chief Eaton[37] was called to the stand by the defense and among other things testified again to the fact that, in addition to the money in Sheppard's wallet, there had been found in currency in the house the sum of $156.70, which testimony again pointed out to the jury that the alleged "burglar" mentioned by Sheppard must not have been interested in money.

Finally, after weeks of trial and day after day of defense testimony which at no point ever offered to the jury a defense, the only witness who was present at the time of the murder and the only person who could possibly explain to the jury who committed this crime, took the stand—Dr. Samuel H. Sheppard.[38]

Sheppard testified as to many things, attempted to explain away all that obviously hurt, denied much, however, in answer to one particular question there is no doubt that Sheppard spoke the truth,

> "Q. Now, Doctor, in your life have you committed any sins? A. I have succumbed to human frailty, yes, sir.",

and succumb he did.

37. Defense Witness, Tr 6062-6078
38. Defense Witness, Tr 6142-6643

Immediately upon taking the witness stand Sheppard commenced his attack on the witnesses who in the past had been his friends but who had testified as to events which obviously displeased Sheppard. In defense to the very incriminating testimony of Mr. Thomas Weigle concerning Sheppard beating his son Chip, Sheppard stated that all he had done was,

> "I took him across my knee and I gave him a few fairly reasonable licks on his back end."

He made the entire incident sound as if Mr. Weigle obviously was not correct in his testimony, especially when he finished with, "That's the extent of it.".

When Sheppard was examined by his attorney concerning his advice in the faking of a head injury, as testified to by his neighbor, Mrs. Houk, he denied such conversation. Similar responses came from Sheppard when quizzed about his dissatisfaction over Marilyn purchasing a new kitchen sink and dishwasher—he answered that he was not mad, he had just wanted to use the money to purchase a new insurance program, that's all.

Sheppard apparently found it necessary to attempt to explain away the testified to conversation he had had with Mayor Houk shortly after the murder wherein Mayor Houk suggested to Sheppard that if he did this to admit it and they would still be behind him, at which point Sheppard suggested to Houk that he was also a suspect. How did Sheppard explain, simple, he could not remember very well the conversation, but nothing such as Mayor Houk testified to could have been said.

Shepard had to attempt to remove from the minds of the jurors that there had been discussions of divorce and separation and that there had been disagreements between

he and Marilyn. This task he tried to accomplish by saying very simply that they just plain were not true,

> "Will you tell the jury whether there was any talk of divorce between you and Marilyn? No, sir . . . Now, was there any serious disagreement between you and your wife? No, sir . . .".

The examination continued on as to whether Sheppard had ever discussed with Dr. Hoversten that he wanted a divorce from Marilyn and the asking of advice from Dr. Hoversten concerning the sending of a letter he had written to Marilyn—Sheppard denied this. All of this testimony of denials was related to the sworn testimony of Dr. Hoversten, the climax coming when Sheppard stated that actually it was Dr. Hoversten who was having marital problems and that Dr. Hoversten asked him to get a divorce and move in with him (Dr. Hoversten), Sheppard finishing his answer with,

> "Something of that sort. In effect, I took it as misery loving company.".

Sheppard had a more difficult time when he attempted to explain away his extra marital activities. The truth as to the activities with Miss Susan Hayes can be quickly ascertained by recalling Miss Hayes' testimony and the answers given by Sheppard when asked about his sworn testimony given at the Inquest.

> "Q. Did you tell the truth there? A. I did not tell the truth in relation to Miss Hayes.
> Q. Do you know whether or not you deliberately lied at that time? Now you can answer that yes or no. A. I felt that Miss Hayes' reputation justified that answer, sir.".

When questioned about another lady, Sheppard admitted that he met her behind a shopping center, went for a ride and wound up parked in his automobile in Metropolitan

Park. Sheppard admitted kissing with the young lady but attempted to relate how she was the aggressor and not him. He stated that it was actually closer to the truth to say that the young lady kissed him and that he did not kiss her. Sheppard also stated that he and the same young lady went for a walk in the woods for two hours and upon their return to the place of beginning where the young lady's husband and Marilyn were waiting, the young lady received a slap to the face by husband for her two hour "walk". When asked how Marilyn felt about all this, Sheppard told the jury that Marilyn felt that she was too attentive toward me, and she felt that I was not—she felt that I didn't push her away perhaps as much as I should have.

Sheppard was called upon by the defense to explain the trail of blood that authorities found in the house. He testified to three main causes for the appearance of blood in the house, the first being their female dog "Koko", Sheppard stating that she "bled all over the house". The next category was what could be termed "bleeding children", Sheppard stating that Chip had a couple of teeth pulled and spit blood on the floor. He said the neighborhood boys were always coming into the house to have their wounds patched up—the Paine boy had a fish hook in his back, and Larry Houk had a bad cut. The third cause which undoubtedly must have caused the jury to wince, was that Marilyn's carelessness with her personal hygiene may have been responsible for the blood throughout the house.

During Sheppard's testimony the jury heard his last and final version of the murder of Marilyn. This time Sheppard stated,

> "As I went up the stairs and into the room I felt I could visualize a form of some type with a light top. As I tried to go to Marilyn I was intercepted or grappled, as I tried to shake loose or strike, I felt

that I was struck from behind, and my recollection was cut off."

Sheppard testified that he came to on the floor facing the door and hallway alongside his wife's bed, he was then asked what he saw,

"Well, I realized I had been hurt and as I came to some sort of consciousness, I looked at my wife. She was in very bad condition. She had been—she had been badly beaten. I felt that she was gone and I was immediately fearful for Chip. I went into Chip's room and in some way evaluated that he was all right."

In this version Sheppard said he heard a noise downstairs and rushed down and at the start of the alleged chase downstairs he said,

"I visualized a form — a large — relatively large form; the clothing was dark from behind; there was evidence of a good-sized head with a bushy appearance to the top of the head — hair."

Sheppard testified that he followed the form down to the beach where he was knocked out and came to with the waves washing over him. The form was gone. Sheppard then related that he returned to the house and called Mayor Houk. In this version he stated that before the Houks arrived he realized that he had "a very severe pain in the neck".

It is interesting to note, as so aptly pointed out by the Ohio Circuit Court of Appeals that reviewed Sheppard's case on appeal, that during the time Sheppard was under cross-examination he gave evasive answers such as "I can't recall" or "I can't remember" approximately 216 times to questions concerning facts and circumstances that took place in his claimed presence which were material to the issues in the case.

(IV) CONCLUSION

The jury could reach one ultimate fact that was undisputed, Marilyn Sheppard, wife of the defendant, Dr. Samual H. Sheppard, was brutally and unmercifully beaten to death in her bedroom sometime between 3 and 4 A.M. of July 4, 1954. There was no question that Marilyn received some 35 blows to her head which literally crushed her skull.

It was unquestioned that Sheppard wanted the jury to believe that in some fashion the attacker entered the Sheppard home while he lay sleeping downstairs, that the "intruder" proceeded upstairs and for some reason beat Marilyn to death. Further, per Sheppard's claim, he heard her emit some sound, so he charged upstairs where he was rendered unconscious, not being hit by the instrument which was used on the then dead Marilyn. After regaining consciousness he heard a noise downstairs, so he took chase, down the steps, through the front room, across the porch, down the steps to the lake and to the narrow beach. He wanted the jury to believe that he struggled with this person on the beach, was again knocked unconscious and there he lay for some two hours before awakening. Sheppard then proceeded back to the house, looked at his wife and then called the Mayor of the Village to report the murder.

From Sheppard's numerous changed versions of the events occuring that July 4th morning, what help did Sheppard give to substantiate his story? He was not sure what wakened him, but he did dash upstairs where he was knocked out, but he could not be sure if he was knocked out at the top of the stairs or in the bedroom. He could not testify conclusively whether or not he struggled, or if he did, whether or not in the bedroom. Sheppard at times claimed to have seen a form over his wife and other times he could not see in the bedroom. The description of the

person upstairs changed constantly from nothing to a form larger than himself with bushy hair. Never did Sheppard state to the jury whether there was one or more persons in the house or if it was the same person in the bedroom that he chased down to the beach. What Sheppard gave to the jury was that there was a burglar in the house that beat his wife to death and as to details, even though he stated he was present during the entire episode, he could be of no help.

Thus, giving Sheppard his absolute right to the presumption of innocence and attempting to fit all the evidence together to reach the conclusion that there was a burglar in the house who committed the murder, what would a burglar have to have done for the uncontroverted evidence to be consistent with his presence and actions. He had to enter the house through a door, as the evidence showed that there had been no forceable entry and the upstairs windows were locked, and walked past the sleeping Sheppard. The burglar then had to proceed upstairs and enter the sleeping Marilyn's bedroom, entering no other room as there was no evidence of disturbance or fingerprints upstairs.

The burglar then proceeded to beat Marilyn with some instrument, which he must have brought with him as nothing could be found missing from the house which could have dealt such crushing blows. If Marilyn screamed or cried out it probably was before the first blow was struck or within the first blow or two, thus, during Sheppard's "dash" upstairs the burglar had to strike the remainder of the 35 blows. This would mean that the burglar had to strike the killing blows in a matter of seconds, which would be almost impossible.

This burglar would then be standing before Sheppard with weapon in hand and never use it on him, but instead render petitioner unconscious with a fist. If there was a

struggle in the bedroom it had to be within a three foot area with neither the burglar nor Sheppard touching the blood spattered wall, as the blood was not smeared.

If Sheppard were knocked unconscious upstairs the burglar then apparently proceeded to remove Sheppard's watch, key chain and ring; then go downstairs, dripping blood, through the downstairs ,into the kitchen and down the basement. In the meantime the burglar left the murder weapon under the pillow on Marilyn's bed as was evidenced by the dried imprint on the pillow case admitted into evidence.

While downstairs, during the time interval Sheppard was out, the burglar had to proceed to remove three drawers from the desk, remove nothing from them, and pile the drawers neatly one on top of the other. Then he must have found something such as a rough cloth or form of sand paper and thoroughly wiped the disturbed portions of the downstairs clean of all fingerprints, leaving the wiped areas rough, as testified to by the finger print experts. The burglar then had to go back upstairs and after allowing sufficient time for all blood to dry, take the death weapon out from under the pillow and remove Marilyn's watch, leaving valuable rings on her fingers.

The burglar may have at this time removed the jewelry from Sheppard but left undisturbed Sheppard's wallet containing cash and a check, the wallet apparently lying on the floor where the burglar had to be standing. He then had to proceed back downstairs, take the green bag containing Sheppard's motor boat tools from the den desk and place Sheppard's jewelry in the bag. The blood on Sheppard's watch was dry and the burglar by this time must have cleaned up as there was no blood on either the inside or outside of the bag. Also the burglar did not place Marilyn's watch in the bag as it was found on the den floor.

Even though the burglar was obviously rather busy in a very short period of time with his cleaning up and all, he took nothing else from the house including over $200 in cash, the cash being in some of the very places that he wiped clean of fingerprints.

Sometime during the burglar's activities downstairs Sheppard awoke and heard him, so he took chase. The burglar bolted out the doors, amazingly leaving no prints or marks on the doors, and ran for the lake. During this chase down the 57 steps to the lake the burglar had to be carrying the death weapon, as it was never found, and had to throw the green bag containing Sheppard's jewelry in the bushes at a point half way down the steps.

Shepard caught up to the burglar at the lake and a struggle ensued, at which time Sheppard was again knocked out, but aparently not with the death weapon. At this point the burglar and the death weapon disappeared along with Sheppard's white T-shirt.

After the disappearance of the burglar Sheppard lay face down in waves that were lashing up clear to the cliff like retaining wall for some two hours and did not drown. After this Sheppard proceeded back to the house, up to Marilyn's room, back downstairs and called Mayor Houk from the living room telephone although there was a telephone next to Marilyn's bed.

What else did the jury conclude from the evidence? That Sheppard was not the even tempered person that he would lead them to believe, that he had admittedly lied in both sworn and unsworn statements and that he had not lead a life of a faithful husband and father. Also, there was testimony to cast sufficient doubt on Sheppard's story such as his claim that he had turned no lights on during the time in question, yet evidence showed that there were lights on in

the Sheppard house, both upstairs and down, just prior to the established time of death.

The jury also saw many things that Sheppard could not explain away, such as how did the water get under his watch crystal,—why did he try so hard to make his friends who testified to appear as if they plainly or that their interpretations of conversations and events were totally wrong.

Thus, there was but one conclusion that the jury could reach as a result of all evidence adduced during the trial of Sheppard, that being, there was no burglar or intruder in the Sheppard home during the early morning hours of July 4, 1954, that the scene of the Sheppard home was "faked" to appear that a burglary had been committed and that Dr. Sheppard was in the murder room at the time of the murder and that he had a reason and temperment to commit murder. The ultimate conclusion beyond any reasonable doubt being that Dr. Samuel H. Sheppard murdered his wife, Marilyn, by brutally beating her to death with 35 crushing blows to the head.

II. Publicity

The District Court devoted twenty-eight pages of its opinion to the quotation of newspaper articles which it considered "to be [the] most relevant"[39] examples of prejudicial pre-trial publicity[40] and four pages to trial publicity.[41] Since the District Court found that no jury could have been impartial, the trial publicity was therefor only cumulative in denying petitioner due process of law. Consequently, respondent, in the following argument, refers to both pre-trial and trial publicity since the same considerations apply equally to the probable effect tof trial publicity

39. Ra 407a (Bracketed material supplied)
40. Ra 408a-435a
41. Ra 444a-447a

as to pre-trial publicity except that the former is found in a context even less susceptible to any effect the publicity may have had. Believing it unnecessary to "analyze in detail"[42] either the quoted or unquoted exhibits of this publicity,[43] the District Court nevertheless found the nature of the publicity to be such that it "strongly *suggested* and, in fact, urged petitioner's guilt."[44] the "suggestive-of-guilt" nature of this publicity was sufficient for the District Court to have had "no compunction in *finding* that the publicity was so prejudicial to petitioner that the assurances of the jurors must be disregarded. . . ."[45] By analogy with and on the authority of *Rideau v. Louisiana*,[46] the District Court disregarded the voir dire examination of prospective and empaneled jurors as being immaterial to the determination of whether or not the community was prejudiced against petitioner. It found, solely on the basis of newspaper articles which "suggested petitioner's guilt" that the "comunity was so prejudiced against petitioner that a fair trial could not be had."[47] These findings resulted in the holding by Judge Weinman "that the prejudicial *effect* of the ["suggestive-of-guilt"] publicity was so manifest that no jury could have been seated at that particular time in Cleveland which would have been fair and impartial regardless of their assurances or the admonitions and instructions of the trial judge."[48] On the basis of *selected* newspaper articles, the District Judge determined either (1) that the "suggestive-of-guilt" pre-trial publicity was evidence, in and of itself, of a manifestation of widespread, deep, and abiding community prejudice or (2) that the "suggestive-of-

42. Ra 436a
43. Pet. Exs. Vol. I, Vol. II, Vol. III, Vol. IV, Vol. V.
44. Ra 436a (Emphasis Supplied)
45. Ra 442a (Emphasis Supplied)
46. 373 U.S. 723 (1963), Ra 438a-439a
47. Ra 443a
48. Ra 444a

guilt" nature of the publicity raised a conclusive presumption of the existence of such community prejudice—the voir dire record to the contrary notwithstanding. What the District Court found simply boils down to a determination by it that since the nature of *some* of the publicity was suggestive of petitioner's guilt, it follows that the community of approximately 1,500,000 people was so pervasively prejudiced against petitioner that twelve unbiased and impartial jurors could not have been empaneled who would have afforded the petitioner his right to a fair and impartial determination of his guilt or innocence. Respondent is confident this Court will agree that the findings of the District Court were clearly erroneous, that there not only is a complete lack of evidence of this case of *actual* community prejudice, but that the nature of the pre-trial and trial publicity[49] is not, by any reasonable view, of such a character as to warrant a presumption of *community* prejudice against the petitioner. Further, this Court will surely recognize the necessity in this case for an independent review of the voir dire record, and will, in making that review find not the first indication of juror prejudice against Sam Sheppard but will find a record indicating complete fairness and impartiality.

At the outset, respondent wishes to make clear that it does not mean to suggest that there are not times when the very nature of the pre-trial *newspaper* publicity is such that a court may reasonably infer therefrom, without examining the voir dire record, a conclusive presumption of the existence of pervasive community prejudice against an accused which would obviously preclude the empanelling of a constitutionally fair and impartial jury.[50] However, in such a case the determination of the actual nature of the

49. See Pet. Exs. Vol. I, Vol. II, Vol. III, Vol. IV, Vol. V.
50. Cf. *Rideau v. Louisiana*, *supra*, n. 46

publicity is obviously critical and requires a detailed, in depth analysis as a whole, viewed against the background circumstances then existing in the community.

The fundamental and obvious difference between the inherent nature of any newspaper publicity and that of television has special importance in the context of a fair trial issue as is presented by this case. It cannot be denied that television has a far greater probability of impressing upon the mind of the viewer, by the impact of its simultaneous visual and audio projections, strong and lasting opinions. This is not to say that newspaper publicity cannot achieve the same effect. But the very character of newspaper publicity presents problems in determining its probable effect of far greater magnitude than those of television.

The first and most obvious problem is that of determining the prejudicial or non-prejudicial nature of newspaper publicity from the *whole*. To say that any one newspaper article, even unequivocal in its accusation of guilt, cannot but create in the mind of the reader an irretrievable, lasting opinion, is to admit an unjustified and complete lack of faith in the basic honesty, fair play and intelligence of American people and their traditional belief in the presumption of innocence.[51] Newspaper publicity, reaching the reader as it does in bits and pieces of daily editions, is far too complex to characterize its nature on the basis of selected articles. This is especially so where those articles are in themselves indirect and equivocal insinuations, unsupported by any unrefuted evidence. The difficulty in characterizing the sum total of newspaper publicity is greatly compounded when, as here, there are parts highly favorable to the accused as well as unfavorable; when, as here, insinuation, surmise, and conjecture fill every unfavorable and some favorable articles; when, as here, the parts con-

51. Eg. Appendices A, B, C, D.

tain no direct evidence of guilt, no confession, or even unequivocal accusations of guilt; when, as here, the reputation of the accused is not marred by any past record of conviction; when, as here, there is no significant publication of any evidence not offered at trial. Each article has its meaning and each meaning has its effect upon the sum total nature of pre-trial and trial newspaper publicity. When the same article admits of more than one meaning, the problem of determining the nature of a multiplicity of articles capable of more than one meaning reaches the heights of ridiculousness. Of course the problem diminishes rapidly in magnitude the more direct and unequivocal each article or combination thereof becomes and the percentage of unequivocally prejudicial articles to the whole increases.

Respondent naturally recognizes that the nature of the newspaper publicity does not exist in a vacuum and that either in part or as a whole it cannot be divorced from the community environment (or the infinite experiences of the individual) from which, to a large extent, the publicity derives its meaning. But this only adds to the problems of presuming community prejudice solely on the basis of the character of the pre-trial publicity.

In the constitutional context with which we are here concerned, the ultimate factor of deciding importance is not the inherent nature of the publicity but its probable effect on the community from which the jurors are to be selected. *Amici*, petitioner, and the District Court have either become so infatuated with the phrase "inherently prejudicial" as to lose sight of its meaning and purpose or they have failed initially to undertsand its meaning and purpose from the context in which it has been used by this Court. The most notable examples of its (implicit or explicit) use are in the cases of *Tumey v. Ohio*,[52] *In re*

52. 273 U.S. 510 (1927)

Murchison,[53] *Gideon v. Wainwright*,[54] *White v. Maryland*,[55] *Turner v. Louisiana*,[56] *Rideau v. Louisiana*, [57] and *Estes v. Texas*.[58] Each of these cases deals with basically different, specific practices and procedures all of which, in different *ways*, had the same *effect*—they impinged upon and denied an accused the fairness and impartiality which is the basic requirement of due process. *In re Murchison*.[59] Irrespective of the specific evil present in each case, it was the adverse effect upon fairness to the accused with which the Court was concerned—"the probability that prejudice will result. . . ." [60] Implicit in the use of the word "probability" is the elimination of all other *unreasonable possibilities*. By way of illustration: It is possible that the judge in *Tumey* could actually have been so honest and immune to the temptation provided by his direct pecuniary interest in the outcome of the case before him that it would not have affected his decision, but it is unreasonable to attribute to judges generally, as fallible human beings, the absence of any temptation, because of *direct* pecuniary interest, not to give the accused the benefit of reasonable doubt or the presumption of innocence. It is possible that Gideon could have been afforded a constitutionally fair trial without the assistance of counsel, but it is unreasonable to say that a layman has the knowledge and ability to take full advantage of all the protections the law offers and the constitution guarantees. It is possible to say that the three jurors who saw Rideau's televised confession could disregard it entirely, but it is unreasonable, without impuning their honesty and integrity in the slightest, to expect them to completely erase such a spectacle from their minds.

53. 349 U.S. 133 (1955)
54. 372 U.S. 335 (1963)
55. 373 U.S. 59 (1963)
56. 379 U.S. 466 (1965)
57. 373 U.S. 723 (1963)
58. 381 U.S. 532 (1965)
59. *Supra*, n. 53
60. *Estes v. Texas, supra*, 543

"Our system of law has always endeavored to prevent even the *probability* of *un*fairness."[61] but "It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a *probability* that prejudice will result that it is deemed inherently lacking in due process."[62] It is apparent that "inherently prejudicial" simply means that the *probable*, not possible, *effect* of the specific evil involved is unfair to the accused in a constitutional sense. In the context of this case we are obviously not concerned with a state procedure or practice which is itself "inherently" prejudicial to the the accused, but only a state procedure whose *use* in certain circumstances *denies* to the accused a fair trial. We are faced, however, with the issue of the probable effect of newspaper publicity on the impartiality of the jurors. Respondent believes that the District Court failed to fully understand the real question in this case and consequently arrived at a clearly erroneous decision. Certainly the publicity attendant upon petitioner's trial is an obvious example of the fourth estate's failure to willingly assume the concomitant responsibilities of the right to freedom of the press. Neither is it an example of a pursuit of excellence in journalism. But no matter how justified our depications of the newspaper publicity in this case, we are not here concerned with the right to freedom of the press or an assessment of its literary capabilities. What we are concerned with, however, is the *probable effect* of *this* newspaper publicity as a whole on the jurors who found petitioner guilty of murder in the second degree.

It is significant in considering this issue to note that with very few exceptions, the publicity which *amici*,

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61. *In re Murchison, supra*, 136
62. *Estes v. Texas, supra* 543
63 *Amici*, n. 12 & 13, p. 6; n. 14, 15, 16, p. 7

petitioner,[64] and the District Court [65] cite as the worst of it apeared in JULY,[66] over two months before petitioner's trial. A fair characterization of this *selected* publicity is that it was designed to spur on the investigation into the Sheppard murder and was highly critical of petitioner's refusal to submit to a lie detector test and intensive interrogation which criticism insinuated that the press held a strong suspicion that petitioner was guilty because of this refusal. In order to say this July publicity was inherently prejudicial we must consider the probable effect on those who read it. The only indication we have of the reader reaction to this publicity is contained in the "letters to the editor" appearing in JULY and found in appendices A, B, C, and D of this brief and throughout Petitioner's Exhibit, Volume I, July 1954. They not only stand as eloquent justification for faith in the basic honest, intelligence, and sense of fair play of American citizens, but clearly indicate that the probable effect of the worst publicity in this case was to create strong and vociferous criticisms of the press and a reaffirmation of the belief in the presumption of innocence. This is but one example of the probable effect of the publicity which *amici*, petitioner, and the District Court erroneously label as inherently prejudicial. Respondent is not so naive as to say that some of the publicity produced in July 1954 was *designed* to inspire objectivity, but the fact remains that at least some people reacted against it with the objectivity our system of justice has always demanded.

It cannot be denied that the "types" of publicity listed by *amici*[67] may, when they exist (they do not in this case) in other circumstances, create the possibility of community

64. Rs. 101-132
65. Ra 408a-435a
66. Pet. Ex. Vol. I.
67. *Amici*, p. 6-7, 10-11

prejudice against an accused. If "the chief function of our judicial machinery is to ascertain the truth," [68] the search is not aided by removing selected examples of newspaper publicity from the context in which they are found to exist. In this respect, the mood or special prejudices of the community, the viciousness and inflamatory nature of the crime, and the size of the community are relevant and important factors. The significant difficulty in reaching a conclusion of what is the probable effect of newspaper publicity on a community, however, is not so much in the determination of community attitudes or moods, but in weighing the probable effect of one article or combination of articles against those moods and attitudes. Add to this the realization that the meaning of any written word(s) depends upon the individual reader's experience, intelligence, and prejudices and we find the complexity of the problem of determining probable effect almost overwhelming. Of course, deciding the probable effect of newspaper publicity decreases in complexity with an increase in the number of articles susceptible of only one obvious meaning.

The problems of nature and probable effect exist in presuming community prejudice from television as well as from newspaper publicity. However, the conciseness, immediacy, and near-reality extant in television's simultaneous audio and visual projections is not found in newspaper publicity. The impact of television is more readily discernable and more likely to create lasting impressions than is newspaper publicity. People do not necessarily believe all they read as readily as what they see. Further, a person's character and intelligence play a far more important role in the creation of an opinion derived from newspaper publicity than in the creation of an opinion derived from viewing television. The newspaper does not furnish the reader

68. *Estes v. Texas*, 381 U.S. 532, (1965)

an opportunity to evaluate first hand the credibility and sincerity of the source by observing the author's demeanor at the same time the information is presented as does the viewer of television. Newspaper publicity injects more opportunity for the article to create a wider divergence of opinions. Consequently, the justifications for a presumption of community prejudice resulting from television are not readily applicable to newspaper publicity.

Respondent respectfully suggests to this Court that a conclusive presumption of community prejudice against an accused inherent in the nature of *newspaper* publicity is justified *only* where the probable effect would be that no reasonable man, possessed of the honesty, integrity, intelligence, and sense of responsibility and fair play we normally accord to jurors, could help but come to a conclusion from a reading of the publicity that the accused was guilty of the crime charged against him. Further, respondent suggests that, due to the magnitude and complexity of problems surrounding the determination of community prejudice from newspaper publicity and the fact that its effect is likely to be more individualized than that of television, the best initial method of determining the existence or absence of actual community and/or juror prejudice in a highly newspaper-publicized trial is still an independent review of the voir dire record. The voir dire presents the most accurate opportunity for a view of the *effect* of publicity upon a cross-section of the community. But more important, it is the *effect* of publicity on the *jurors* with which we are ultimately concerned. Although it is important that the appearance of justice be maintained, due process of law *in fact* has been in the past and should be in the future our ultimate goal, guided by the realization that to a great degree each case must be decided on its own special facts. The facts of this case do not warrant a pre-

sumption of community prejudice inherent in the nature of the pre-trial publicity nor do they justify a finding of actual juror prejudice against the petitioner. Since the District Court disregarded the voir dire record and found from the publicity alone a denial of petitioner's constitutional right to a fair trial, respondent will argue beginning from the same place—the inherent nature of the pre-trial publicity. The following will but emphasize the necessity for an independent examination of the voir dire record.

A—Probable Effect of Pre-Trial Publicity

If, as the District Court has done, we are to presume community prejudice from the nature of the pre-trial newspaper publicity without a showing of any nexus between that publicity and a fatal infection of the trial with prejudice, respondent contends the nature of the newspaper publicity must be determined from the totality of circumstances then existing in Cleveland and the totality of the publicity. The necessity for a detailed analysis of the pre-trial publicity in particular is especially compelling when, as here, there does not exist any direct evidence of actual community prejudice and we must find sufficient community prejudice to warrant disregarding an independent examination of the voir dire as immaterial. Respondent emphasizes here that the Court of Apeals did make such an analysis[69] of the pre-trial publicity and gave what this Court will find to be an extremely fair, impartial, and factual summary of it character.[70] Further, the Court of Appeals was unanimous in its decision of the issue of pre-trial publicity.[71]

Petitioner has not offered any unequivocal, direct evidence of *community* prejudice or any newspaper publicity which was an unequivocal, direct assertion of petitioner's

69. *Sheppard v. Maxwell*, 346 F. 2d, 707, 712 (1965)
70. *Id*, 715-716
71. *Id*, 755

guilt. An examination of those *selected* articles quoted by the District Judge and which serve as the basis for the briefs of petitioner and *amici*, indicates that they *could* convey to the reader a *suggestion* of petitioner's guilt. Respondent maintains that a fair view of those articles is that they could also convey the *insinuation* that there was a belief by *some* of the press and *some* of the prosecuting officials in the guilt of Sam Sheppard. However, there was no direct, unequivocal statement that either the press or prosecuting officials actually believed Sam Sheppard was in fact guilty. Contrary to what petitioner and the District Court would have us believe, the publicity was not all unfavorable to Sam Sheppard [72] and certainly did not go so far even to assert that he was guilty.

Relevant to a finding that the probable effect of pre-trial publicity was to create a lasting opinion of guilt in the minds of the jurors, is the existence or absence of direct evidence of guilt published in the newspapers but not offered or inadmissible at trial. Although *amici* asserts that this case is "replete" [73] with such evidence, an examination of those newspaper articles cited by *amici* as examples thereof [74] will show this assertion to be completely erroneous and misleading. Further, it is necessary to keep in mind that it is not *any* opinion a juror may have which due process condemns, but only an opinion which will "necessarily raise the presumption of partially." [75] or an opinion the strength of which would require some evidence of innocence to overcome. The caveat of Mr. Justice Clark writing for a unanimous Court in *Irvin v. Dowd* is especially appropriate in this context.

72. See Pet. Exs. Vol. I, Vol. II, Vol. III, Vol. IV, Vol. V.
73. *Amici*, p. 19
74. *Amici*, n. 13, p. 6; n 14, p. 7.
75. *Reynolds v. United States*, 98 U.S. 145, 156 (1879)

"To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Spies v. Illinois, 123 U.S. 131, 31 L. ed. 80, 8 S. Ct. 21, 22; Holt v. United States, 218 U.S. 245, 54 L. ed. 1021, 31 S. Ct. 2, 20 Ann. Cas. 1138; Reynolds v. United States (US) supra." [76]

Publication of prosecution evidence not offered or inadmissible at trial is governed by considerations somewhat different than other kinds of publicity when we are trying to determine the probability of unfairness to the accused from newspaper publicity. The importance of whether or not it is direct or equivocal evidence of guilt is obvious. The source of the publicized evidence is also relevant because it often lends credence to the truth of the information published. Whether or not there was also published rebutting evidence and whether or not the unfavorable evidence was admitted at trial is important. In conjunction with this latter consideration it should be remembered that although we are engaged in the effort of determining the probability of fixed juror opinions, the very purpose of requiring impartial jurors is to afford an accused a fair and impartial determination of his guilt or innocence. If evidence of guilt is actually introduced without objection at trial where the protections of the courtroom are available, its publication prior to trial obviously has far less significance in creating the unfairness with which we are concerned. (Of course, confessions cannot be properly placed in the category of evidence we discuss here because the publication of confessions takes the *whole* trial outside the courtroom) Not-

76. *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)

withstanding *amici's* assertion that the publicity in this case is "replete" with evidence of guilt not offered at trial or inadmissible if offered, an examination of those articles cited in support of this assertion will show it to be completely erroneous as a basis for presuming inherent prejudice.

Under amici's heading: "Damaging publicity describing prosecution evidence which varies materially from that introduced at trial by the prosecution."[77] (A category previously described as "Publicity relating to testimony of witnesses not offered at trial by the prosecution."[78] Examples of this category are exactly the same as those under the present heading.) there are listed the following examples thereof:

> 1. An article headlined "'Bare-Faced Liar,' Kerr Says of Sam."[79] which referred to petitioner's sworn testimony.

An examination of this article will reveal that Captain Kerr, head of Cleveland's homocide unit, was in fact reported to have called petitioner a liar in the latter's sworn testimony and that Captain Kerr did not appear as a witness at trial. However, facts not pointed out to this Court are that the article appeared not before trial but on December 11, 1954, almost two months after the trial had begun; that petitioner's sworn testimony to which Captain Kerr referred consisted of statements by petitioner that he had been mistreated while in the custody of the Cleveland police (far removed from testimony directly asserting petitioner's guilt); that there is no evidence to indicate this article was ever seen by the jury; and that at the time of

77. *Amici*, p. 19
78. *Id.* p. 6
79. *Id.* n, 62 p. 19-20, See also Rs 110

its publication the jury had more than sufficient evidence before it to indicate petitioner had been less than truthful.

2. An article headlined "Sam Called a 'Jekyll-Hyde' By Marilyn, Cousin to Testify" [80] containing testimony of a prospective prosecution "bombshell" witness.

The cousin was Thomas Weigle who, contrary to *amici's* assertion did testify at trial and whose testimony was almost verbatim of that appearing in the article except for the fact that he did not testify to hearing Marilyn Sheppard call petitioner a "Jekyll-Hyde" which term, in the context of the publication, referred to petitioner's explosive temper —the very thing to which Weigle testified.[81] This article appeared on November 24, 1954, a month after, not before the trial began and petitioner has offered no evidence to show that the jurors ever saw it. The article is not direct evidence of guilt and there is massive evidence of countervailing effect both in pre-trial and trial publicity and testimony of the defense. *Amici's* statement that this article was induced by law enforcement officials is pure fiction.

3. An article headlined "Painesville Woman's Story Opens New Sheppard Quiz. Says Doctor's Wife Wanted To Get Divorce." [82]

It is true that the "Painesville Woman" never testified at trial and that this article appeared on July 15, 1954 two months before trial. However, Susan Hayes,[83] Nancy Ahern,[84] Lester Hoverstein,[85] Stephen Sheppard,[86] and petitioner[87] himself all testified at trial to either petitioner's

80. *Amici*, p. 20, See also Rs. 109
81. Tr 4816-4829
82. *Amici*, n. 13 p. 6, See also Ra 415a
83. Tr 4830-4859
84. Tr 2128-2158
85. Tr 3767-3823
86. Tr 5013-5594
87. Tr 6142-6643

infidelity to his wife and/or he or his wife's desire for a divorce. The "Painesville Woman" herself gave the information to the press, not the prosecution officials.[88]

4. An article headlined, "But Who Will Speak For Marilyn"[89]

Respondent specifically invites the Court to read this particular article over which the District Court, petitioner, and *amici* have made so much comment because respondent is sure the Court will find it as ridiculous as do we as an example both of publicity induced by prosecution officials (which is unmitigated fiction) and as an example of testimony not offered at trial upon which was found a trial fatally infected with the inherent prejudice of pre-trial publicity. It appeared October 23, 1954, after the start of the trial and is nothing more than an amateurish attempt at descriptive prose which obviously failed to attain the heights of literature sought by the author. It contains no testimony of any kind.

Under amici's heading: "Damaging publicity describing prosecution evidence which would be inadmissible in Court."[90]

After listing eight different references under this category,[90] investigation reveals that *amici* makes reference to the same "inadmisible" evidence in all eight—the fact that petitioner had refused to submit to a lie detector test. (Not the fact that he took one and failed, however.) The fact of petitioner's refusal was publicized repeatedly between July 8 and July 22, 1954, prior to trial. Since petitioner assigns the admission into evidence of this fact as a constitutional error, respondent will defer argument to a

88. Ra 415a
89. *Amici*, n. 13, p. 6, See also Rs 126
90. *Amici*, p. 7, n 66, p. 22

later point in his brief. However, it should be pointed out in connection with the probability of unfairness question here that the fact of refusal to submit to a lie detector test was admitted without initial objection at trial and discussed by petitioner on his direct examination by defense counsel. Further, there was a plethora of countervailing publicity asserting Sam Sheppard's innocence.

Respondent realizes that the foregoing discussion relative to evidence not offered or inadmissible at trial is rather lengthy. However, *amici's* obvious attempt to present a view of this case all out of proportion to the true facts and actual significance thereof, added to the same attempt by petitioner, only makes unnecessarily more confusing a case already complex due to the voluminous record and the fact that it is not printed. Further, it just cannot be said with any justification that the record herein contains any significant or substantial quantity of unequivocal evidence (if "evidence" at all) of guilt whose probable effect would be to create a lasting opinion that Sam Sheppard was guilty.

Volume I and II of newspaper clippings before this court show that in July, August, and September, respectively, the Cleveland newspapers reported a detailed, blow by blow account of the progress of the investigation into the Sheppard murder. At no time has petitioner impuned or attempted to impune the accuracy of those reports. Although some of the articles suggest a belief by some in his guilt, there also appear repeated protestations by Sam Sheppard of his innocence [91] and his desire to assist in solving the crime and finding the killer of his wife Marilyn.[92] In addition, there appear numerous reports of petitioner's own story of what transpired at the time of the murder.[93]

91. Eg. Appendices E, F & I
92. Eg. Appendix I
93. Eg. Appendices E & I

In contrast to the publication of detailed confessions in *Irvin v. Dowd*[94] and *Stroble v. California*[95] the televised confession in *Rideau v. Louisiana*[96] and the report of a confession in *Shepherd v. Florida*[97] the record in this case is singularly significant in the conspicuous absence of any hint, suggestion, or insinuation of a confession having been made by the petitioner herein. In the same volumes, the Court will find repeated newspaper reports of the unwavering belief in petitioner's innocence by his family,[98] friends,[99] counsel,[100] and by the employees of the Bay View Hospital where petitioner was a member of the Staff.[101] Of special note is the reported belief of Susan Hayes that she did not believe Sam Sheppard guilty and that she felt sorry for him.[102]

Although petitioner's refusal to submit to a lie detector test, truth serum injections, and "grilling" by the police were duly headlined, his reasons for not doing so were also fully explained in the same and other articles.[103] Petitioner gave an "exclusive interview"[104] to one newspaper and issued a prepared statement[105] to all of them in both of which he proclaimed his innocence, decried his treatment by the police, and set forth his own story and theory of the events which took place at the time of the murder. The newspapers also reported Sam Sheppard as being willing to talk to the police and that he would have talked more

94. 366 U.S. 717 (1961)
95. 343 U.S. 181 (1952)
96. 373 U.S. 723 (1963)
97. 341 U.S. 50 (1951)
98. Eg. Appendix H
99. Eg. Appendix G
100. Eg. Appendix H
101. Eg. Appendix G
102. Appendix G
103. Eg. Appendices B, C, D.
104. Eg. Appendix E
105. Eg. Appendix I

than he did had his attorney not restrained him from doing so.[106]

Volume III of the newspaper clippings is significant in that the newspaper articles contained therein are almost entirely devoted to actual quotations from the record of the voir dire examinations of prospective jurors—an exercise of the jealously guarded right of a free press to report what transpires as a matter of record in the courtroom. *Bridges v. California*,[107] *Pennekamp v. Florida*,[108] *Estes v. Texas*.[109] The remainder of the October, 1954 scrapbook is replete with sympathy evoking articles concerning the entire Sheppard family, their unfailing loyalty to Sam, and their unswerving belief in his innocence despite the hardships and inconveniences imposed on them by the impending trial. Other articles report the expression of surprise and disbelief of numerous people that Sam Sheppard was the defendant in a murder trial.[110]

In contrast to *Irvin v. Dowd*,[111] wherein actual community and juror prejudice was found to exist, the publicity in this case *did not* contain any reports attributing to Sam Sheppard the commission of juvenile crimes, convictions of arson or burglary, convictions by a military courts-martial, or the commission of parole violations. There is nothing in the newspaper publicity in this case to indicate that petitioner's character prior to the murder was anything but exemplary, except for the reports of his marital infidelity. Respondent does not believe that in this day and age, reports of extramarital relations, admitted by the petitioner, could have been so shocking to the sensibilities of the community so as to cause it to thirst after blind and unintelligent revenge

106. Eg. Appendix F
107. 314 U.S. 252 (1941)
108. 328 U.S. 331 (1946)
109. 381 U.S. 532 (1965)
110. Eg. Appendix G
111. *Supra* @ n. 94

against Sam Sheppard, especially where, in all other respects, his personal and public life appeared to be without fault.[112]

Although petitioner, *amici*, and the District Court seek to give the impression that the nature of the pre-trial publicity as a whole and standing alone was so inherently prejudicial to Sam Sheppard that it raised a conclusive presumption of community prejudice, respondent is confident this Court will find as clearly erroneous such a characterization, as did the Court of Appeals. On the contrary, the only reasonable and substantial inference which could be drawn from reading the pre-trial publicity *at the time it was published* is that at its worst this publicity whetted the appetite of the morbidly curious and, through sex and mystery, insinuation and innuendo, at most *invited* speculation, surmise, and conjecture. In a word, the inherent nature of pretrial publicity in this case could only be described as equivocal and the only reasonable inference to be drawn from its nature is that no unequivocal and reasonable inference of petitioner's guilt could be formed. Unlike the 150,000 people of tiny Calcasieu Parish,[113] the 1,500,000 residents of Cuyahoga County, Ohio did not witness repeatedly *any* spectacle of Sam Sheppard personally confessing in detail to robbery, murder, and kidnapping on a twenty-minute sound film shown three different times on local television.

> ". . . The publicity involved in the present case was not of a nature calculated to inspire confidence in the objectivity and good taste of the public news media. But neither was it of a nature calculated to create lasting opinions. (if it ever created any prejudicial opinions at all) as to Dr. Sheppard's guilt. Surmise, conjecture, and accusation were substituted for confession, criminal record, or direct evidence. We are not

112. Eg. Appendix D
113. *Rideau v. Louisiana, supra*

prepared now to hold that American citizens have so far forgotten their traditional heritage of 'fair play' that such shabby reporting would irretrievably infect the minds of an entire metropolitan community. Our jury system cannot long survive if it is now proper to *presume* that jurors, selected with the care taken in this case, are without the intelligence, courage and integrity necessary to their obedience to the law's command that they ignore the kind of publicity here involved."[114]

B. Actual Effect of Pre-Trial Publicity

That the nature of the pre-trial publicity herein was inherently prejudicial to the petitioner is, respondent maintains, a clearly erroneous finding by the District Court. However, even on the bases of this erroneous finding, it is impossible for respondent to understand by what logic or intellectual powers the District Court deduces from the inherent nature of the publicity a conclusion that the "prejudicial *effect* of the newspaper publicity was so manifest,"[115] especially without an examination of the voir dire and in the absence of any evidence of that manifestation. The authority of *Rideau v. Louisiana*,[116] upon which the District Court relied heavily, does not support the use of such gratuitous assumptions. In *Rideau* this Court certainly did not go so far as to presume to find any readily apparent effect upon the community from what it considered to be inherently prejudicial pre-trial publicity. Obviously *Rideau* goes no further than to stand for the proposition that in the circumstances of that case it was unreasonable to expect fallible men to completely disregard the inescapable impression of *seeing* an accused personally confess in detail to robbery, kidnapping, and murder outside the courtroom. The District Court goes much too far even with its own erroneous characterization of the publicity.

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114. *Sheppard v. Maxwell*, 346 F. 2d, 707, 720 (6th Cir. 1965)
115. Ra 444a
116. *Rideau v. Louisiana*, *supra*

In contra-distinction to *Irvin v. Dowd*,[117] the Court will not find, as evidence of actual community prejudice, any newspaper articles in the pre-trial publicity of this case which reported that " 'strong feelings, often bitter and angry, rumbled to the surface' "[118] or that " 'the extent to which the multiple murders—three in one family—have aroused feelings throughout the area was *emphasized* Friday when 27 of the 35 prospective jurors questioned were excused for holding biased pre-trial opinions' "[118] or that there existed " ' a pattern of deep and bitter prejudice against the [accused]' "[119] or that " 'impartial jurors are hard to find.' "[119] Of some significance in this respect are the "letters to the editors"[120] found throughout Volumes I, II, and III. Despite the District Court holding that the "prejudicial effect of the newspaper publicity was so manifest", the only direct evidence in the record of *any* effect the *newspaper publicity* may have had at all exists in these "letters to the editors." The "letters" clearly indicate that some of those who wrote letters were critical of the manner in which the investigation was handled and some people believed Sam Sheppard to be guilty, but most were either critical of the press and/or they still believed in the proposition that an accused was innocent until proven guilty beyond a reasonable doubt and Sam Sheppard was entitled to the benefit of that proposition.[120] Like the nature of the publicity, the only evidence of its manifest effect upon the *community* was at best varied and equivocal. By no stretch of the imagination could the community feeling be said to justify the inference of manifest community prejudice against Sam Sheppard. A presumption to the contrary is patently more reasonable. If there are any news-

117. *Irvin v. Dowd, supra*
118. *Irvin v. Dowd, supra*, 726
119. *Irvin v. Dowd, supra*, 727
120. Eg. Appendices A, B, C, & D.

paper articles in this record to indicate any *community* opinion, respondent contends that the only fair and reasonable conclusion which *could* be drawn from them is the inference that there existed no unequivocal pervasive community opinion against Sam Sheppard, but on the contrary there is unequivocal evidence of the existence of sympathy toward and a belief in the innocence of Sam Sheppard.

In the context of *actual* community prejudice, we do not find involved in this case any evidence of an inflamed community such as the mob violence against the accused, his family, and race in *Shepherd v. Florida*[121] or the state-wide concern over sex crimes against children as in *Stroble v. California*.[122] Significant is the absence of any evidence to indicate any special community moods or prejudices which would lend special meaning to the publicity here involved or increase the probability and/or quality of its prejudicial effect, if in fact the publicity had a prejudicial effect. Our system of justice and especially our jury system, based as they are on a justified faith in the American people's integrity and the sincerity of their belief in the presumption of innocence, cannot long survive if it is now proper to presume juror prejudice because of remote possibilities of community prejudice. It is for this reason that it was clearly erroneous for the District Court to disregard the voir dire as immaterial, for our ultimate concern is with the prejudice which a juror, not the community, has against an accused. If our goal is to be due proces of law in fact, the search for truth necessary to achieve that goal is not advanced by unfounded speculation about the probable effect of newspaper publicity.

Traditionally, the voir dire record has been found to be not only the best but also the most readily available source

121. 341 U.S. 50 (1951)
122. 343 U.S. 181 (1952)

of evidence to indicate the existence or absence of both juror and community prejudice. *Darcy v. Handy*,[123] *Irvin v. Dowd, supra*,[124] and *Rideau v. Louisiana, supra*. As Mr. Justice Holmes speaking for a unanimous Court in *Holt v. United States*,[124] cautioned: "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial[s] under the conditions of the present day."[125] It is because the law realizes a system of justice by one's peers presents opportunities for injustice that the voir dire has become a traditional means of preventing that opportunity from becoming a reality.[126] It does not seem to be asking too much that a particularized examination of the voir dire be made especially where, as here, we have neither unequivocal evidence of community or juror prejudice, publicity of such an obviously and pervasively prejudicial nature, or any evidence to show that it infected the trial as to reduce an examination of the voir dire to but a hollow formality.[127] Even the most casual review of the voir dire discloses its lack of support for petitioner's allegations. On the contrary just the opposite becomes obvious.

The state trial judge clearly recognized the importance and purpose of the voir dire when denying the initial motions for a change of venue, he stated:

> ". . . we will proceed . . . in an effort to determine whether or not we can secure a fair and impartial jury. If we are not able to do that, there will be no question in this Court's mind at all but what this case ought to go out of Cuyahoga county whatever may be the effect of that."[128]

123. 351 U.S. 454, 462-463 (1959)
124. Citing *Reynolds v. United States*, 98 U.S. 145 (1879); *Spies v. Illinois*, 123 U.S. 131 (1887); *Holt v. United States*, 218 U.S. 245 (1910).
125. *Holt v. United States, supra*, 251.
126. *Darcy v. Handy, supra*, 462.
127. Eg. *Rideau v. Louisiana, supra*.
128. Tr. 4

Judge Blythin was also intensely aware of what the law deems to be a fair and impartial juror. In his instructions to the panel of prospective jurors, after explaining to them that the presumption of innocence accorded to an accused is to persist until he is proved guilty beyond a reasonable doubt, went on to caution that a finding of guilt or innocence was "to come not from anyone's notions or outside information, but must come [from] the testimony heard from this witness stand . . ."[129] and that "an impartial juror is a juror who will sit here patiently without any passion, prejudice, or feeling and who will carefully listen to all the evidence . . . to the instructions of the Court as to the law, and be guided solely by them . . . in his decision. . . ."[130] In addition to this general instruction the trial judge explained the purpose of the voir dire to each juror individually.

The voir dire lasted nine days and takes up over 1600 pages of the trial record. Those pages exhibit anything but a hollow formality. Respondent finds it extremely improbable, if not impossible, that the instructions of the trial judge would be unavailing in the face of the publicity or that there were unauthorized, prejudicial contacts with the jury as presumed by the District Court and the dissenting judge in the Court of Appeals. The thoroughness[131] and frequency[132] of the judge's instructions and admonitions throughout the voir dire alone could not but impress upon each juror an intense awareness of the necesity for and their duty to keep their own counsel and not to discuss

129. Tr. 31

130. Tr. 32. See also Judge Blythin's definition of an impartial juror as quoted by the Court of Appeals. *Sheppard v. Maxwell*, 346 F.2d 707, 715, n. 4 (6th Cir. 1965)

131. For significant examples of thorough instructions and admonitions on voir dire alone, see Tr. 897, Tr. 1097-1098, Tr. 1427-1428, Tr. 1446-1448, and Tr. 1590-1592.

132. The trial judge never failed to caution and instruct the jury each time they left the courtroom during voir dire in terms similar to the instructions cited in note 131, *supra*, varying only in length depending upon the length of recess or adjournment.

the case with anyone or listen to a discussion of it by others. One cannot help but be impressed by the searching questions and especially by the consistently repeated admonitions, instructions, and explanations given each and every juror seated on the jury. The trial judge, the prosecutor, and the defense counsel each repeatedly sought to impress upon the minds of every juror the serious and awesome responsibility of deciding the fate of a man's life and the necessity for doing so only on the evidence produced at trial.[133] Each juror was subjected to searching and detailed questioning by prosecution and defense and each stated they had not discussed the case prior to voir dire and had expressed no opinion on the guilt or innocence of the petitioner. Each juror repeatedly swore he had NO opinion as to the guilt or innocence of the accused but could unequivocally give him that presumption of innocence which the law requires. In addition, all the jurors swore he or she would be free from all previous outside influences, enter upon their task with open minds, and decide petitioner's guilt or innocence solely upon the evidence adduced at trial. Finally, each and every juror was asked to honestly search his mind and heart for any possible prejudice they might have and all unequivocally affirmed their ability to accord petitioner a fair and impartial trial and their ability to avoid discussing the case with family and friends.[134]

Out of an original panel of 71 prospective jurors called, defense accepted twelve jurors before exhausting the entire

133. Tr. 379

134. Eg. Juror Borke had informed her husband not to discuss the case as soon as she received her notice of jury duty. (Tr. 148) Juror Orenstein also testified as follows:

> "Q. If you are accepted as a juror in this case, will you keep to yourself and not allow anyone to talk to you about it?
> "A. Yes sir, in fact
> "Q. Or not discuss it with anybody?
> "A. May I say that I have already since Monday instructed my family not to question me at all and they have not done so." (Tr. 484)

panel.[135] Out of this single panel of prospective jurors only 14 were excused for cause,[136] many of them because of opinions about the impropriety of capital punishment. Only one member of the jury who deliberated petitioner's case was challenged for cause and not excused by the trial court.[137] However, the defense accepted this jury while still having one peremptory challenge remaining after the last alternate juror had been examined and accepted.[139] Since the defense had not even used all of its peremptory challenges petitioner therefore should not now be heard to complain at this late date.[140] Further, Juror Barrish swore under oath he had no opinion at all and would be fair and impartial. The voir dire further reveals that NOT ONE of the jurors impaneled in this case stated he had an opinion that petitioner was guilty which would take some evidence to overcome.[141] In fact each juror stated they had no opinion

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135. Compare *Irvin v. Dowd, supra*, where 430 jurors were examined.

136. Compare *Irvin v. Dowd, supra*, where 268 or 62% were excused for cause due holding fixed opinions.

137. Juror Barrish, Tr. 51-117, recalled at Tr. 805-811.

138. Juror Mancini, Tr. 1544-1581.

139. The following colloquy took place at the conclusion of Juror Mancini's examination:

"Mr. Garmone: Thank you, that is all, your Honor, at this time.
"The Court: The State has a challenge.
"Mr. Mahon: The State is satisfied with this juror, if your Honor please.
"Mr. Corrigan: We pass the juror. [defense counsel]
"The Court: You pass for cause, and you pass peremptorily?
"Mr. Corrigan: Pass peremptorily.
"The Court: Do I understand that you have no peremptory?
"Mr. Corrigan: We have no peremptory.
"The Court: You have no peremptory?
"Mr. Corrigan: No peremptory." (Tr. 1581)

140. Petitioner claims a due process deprivation (Ra 150a (2), # 9.) in that he was denied a peremptory challenge when alternate juror Hansen was seated on the panel as a replacement. This claim is of course answered by *Spies v. Illinois, supra*, n. 124. However, after concluding examination of juror Hansen petitioner's defense counsel stated: "Mr. Corrigan: We accept this juror." (Tr. 1494)

141. Compare *Irvin v. Dowd, supra*, where ⅔ or 8 out 12 jurors empaneled they had an opinion that petitioner was guilty which would take some evidence to overcome.

at all. This alone indicates that petitioner was not denied due process but on the contrary was afforded more than the law requires. Due process does not require a juror to be without *any* opinion but only that he be able to lay aside his opinions and be able to render a verdict only on what transpires in the courtroom.[142]

In view of the searching inquiry, the extensively repeated instructions and admonitions of the trial judge and counsel for both sides, the apparent satisfaction of the defense with the jury, and especially the sworn declarations of impartiality on the part of each juror, respondent is, as the Court must be, at a complete loss to find or understand any justification for "disregarding the assurances of the jurors." This case presents no unusually compelling circumstances to justify a conclusion that the jurors were so blinded by the publicity so as not to know their own minds and emotions, or that they were so unimpressed with their solemn responsibility as to jeopardize the fate of petitioner's life, or that they were less than honest and sincere during voir dire and later at the trial.

Respondent is fully aware that it has argued publicity in general and pretrial publicity in particular at some length. However, as Mr. Justice Clark in *Estes v. Texas*, observed, speaking of pre-trial publicity: "Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence."[143] But here, petitioner has failed to present any evidence of community prejudice, or evidence that it was so pervasive that jurors could not help but have an opinion of guilt, or evidence that the jurors were ignorant of their own emotions or untrue to their oath, or evidence that any prejudice infected the trial as to deny him the fairness of due process.

142. *Reynolds v. United States, supra*; *Spies v. Illinois, supra*; *Holt v. United States, supra*; *Irvin v. Dowd, supra.*
143. *Estes v. Texas, supra*, 541.

The voir dire dramatically indicates the complete absence of any foundation for presuming that the "suggestive-of-guilt" nature of equivocal publicity insidiously denied him his constitutionally guaranteed rights. It is evidence that he was in fact afforded more than the Constitution of the United States requires. Paraphrasing the Court in *Darcy v. Handy*,[144] while this Court stands ready to correct violations of constitutional rights, it also realizes that if the mere opportunity for prejudice is to raise a presumption of unfairness, the jury system will not long last. Therefore, "It is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality."[145] The propriety of this requirement, in the circumstances of this case, cannot be doubted. The presumptions of constitutionality and juror impartiality are not unfounded and purposeless fictions of the law. That they require the petitioner to show some identifiable prejudice to be entitled to the relief sought here has long been the well-founded position of this Court.[146] Petitioner draws no support for his position that he be excused from sustaining his burden of proof from *Rideau v. Louisiana*, *supra* or *Turner v. Louisiana*, *supra*, irrespective of the fact that the nature of the publicity here comes nowhere near that found in *Rideau*. That contention is clearly answered by *Estes v. Texas*, *supra*. "It is true that in *most* cases involving claims of due process deprivations we require a showing of identi-

144. *Darcy v. Handy*, *supra*, 462.

145. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 281 (1942).

146. *Reynolds v. United States*, *supra*; *Spies v. Illinois*, *supra*; *Holt v. United States*, *supra*; *Adams v. United States ex rel. McCann*, *supra*; *Brown v. Allen*, 344 U.S. 443 (1953); *Darcy v. Handy*, *supra*; *Stroble v. California*, 343 U.S. 181 (1952); *Irvin v. Dowd*, *supra*; *Beck v. Washington*, 369 U.S. 541 (1962); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Estes v. Texas*, *supra*.

fiable prejudice to the accused."[147] That this Court has "departed from the approach it *charted* in *Stroble* . . . and *Irvin*"[148] cannot be read in the context in which the statement appears to stand for the proposition that *Stroble* and *Irvin* are no longer pertinent. *Estes* is but a recognition that there are times when the probability of prejudice is so manifest that an inflexible application of the rule in *Stroble* and *Irvin* is to disregard the obvious, substitute form for substance, and require an accused to perform the impossible task of proving the insidiousness of a specific practice or procedure.[149] All the cases discussed in *Estes* at page 543 are but other examples of the unreasonableness of disregarding reality by an inflexible application of the requirement that an accused show the existence of some identifiable prejudice despite the insidiousnes and obviously prejudicial nature of the practice. "Nevertheless, *at times* a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process."[150]

The publicity in this case was not of an inherently prejudicial nature and without more, it cannot be reasonably asserted that it presented such a probability that prejudice would result to hold the denial of a change of venue and the denial of a continuance constituted an inherently prejudicial state procedure. This is especially so when the person most able to assess the probability of prejudice, was convinced, in the exercise of his own sound discretion, that the jury selected could be and was fair and impartial. The defense failure to use all of its peremptory challenges, to file an affidavit of prejudice against the judge, to request the

147. *Estes v. Texas*, *supra*, 543 (Emphasis Supplied).
148. *Ibid.*
149. "Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced." *Ibid.*
150. *Ibid.*

sequestration of the jury or to assign lack of sequestration as error on appeal, and its failure to question jurors as to prejudicial influences both before and after trial at the hearing on a motion for new trial, while not determinative of the issue here, are all significant evidence that the defense concurred with the trial judge in his determination that a fair and impartial jury had been selected.[151] It is against this background that respondent now turns to the actual trial of petitioner to argue that, notwithstanding petitioner's failure to sustain his burden of proof or to show any nexus between the pre-trial publicity and/or proceedings with his trial, he was *not* denied a trial by a fair and impartial jury.

151. Accord: *Darcy v. Handy, supra; Beck v. Washington, supra.*

III. CLAIMED DUE PROCESS DEPRIVATIONS AT TRIAL

A. Fair and Impartial Jury (Trial Publicity)

Petitioner makes no claim that any particular petit juror was biased or partial against him or that any adverse juror opinion was actually present or actually infected his trial. Neither does petitioner make any pretense at attempting to prove actual prejudicial contacts with the jury during trial which would infect his trial with fundamental unfairness. Petitioner argues that the mere existence of "adverse" trial publicity and "alleged" prejudicial contacts with the jurors during deliberations must be held to have presumptively infected the minds of the jurors without even an attempt at showing and without any evidence of any nexus between the mere existence of the publicity and the contacts with jurors and a constitutionally fatal infection of his trial with fundamental unfairness. If we are to presume prejudice from the mere opportunity therefor, we are again, as with the pre-trial publicity, faced with the problem of determining the probable effect upon petitioner's trial posed by the mere existence of the publicity and contacts with the jurors. Notwithstanding petitioner's burden of proving the essential unfairness of his trial, respondent's argument is addressed to the improbability of prejudice to the accused and evidence of a trial by a fair and impartial jury.

In this conection, there are considerations somewhat different from those pertinent to the probable effect of pretrial publicity. Of course, we are concerned with the nature of the publicity itself, its source, and the attendant circumstances of its publication. But concerning publicity produced during the trial we have the additional considerations of whether or not the information contained in the

publicity was admitted as evidence at trial, whether or not there was introduced rebutting evidence, whether or not the same information was received in evidence but from a different source, and whether or not introduction of the information contained in the publicity was with or without objection by the defense. All of these considerations are both relevant and material to find the probable effect of publicity and juror contacts during the trial.

Of course, the above considerations all implicitly assume actual juror contact. In this case an inquiry into probable effect has the additional burden of proceeding first to find justification for probable contact with the jury. In reference to probable contact with the jurors, consideration thereof must proceed upon the realization that the voir dire clearly indicated each jurors' qualifications of impartiality far exceeded the minimum standards this Court has previously established and there is no evidence justifying the presumption that jurors were or are unfaithful to their oath or that they were not sufficiently instructed by the trial court, prosecution and defense. The latter was obviously convinced of the jurors' impartiality and integrity. In short, we must proceed not only with a presumption of juror impartiality and obedience to their oath, but with unrebutted evidence thereof.[152]

"This Court holds that there was such a plethora of prejudicial material contained in the newspapers that no admonition or charge of the court could vitiate the effect of the publicity."[153] Respondent cannot nor does it wish

152. Statements made by jurors after trial indicate the validity of our justifications for presuming juror honesty and intergrity. (Appendices J, K, L, & M) EG. "Mrs. Louise K. Feuchter gave newsmen little information, but pleaded with him to 'put this in your story': 'I'm so greatful to all my friends and relatives who never questioned me about the trial.'" (Appendix J; p. 2, Col. 5.)

153. Ra 450a.

to minimize the volume of publicity in this case.[154] However, respondent cannot agree with the District Court's characterization of the newspaper publicity as a "plethora of *prejudicial* material." Except for those articles set out in full by the District Court, all the headlines quoted by it were, although sensational, merely introductions to verbatim quotations taken from the trial transcript. Except for the notable examples discussed below, a review of the trial publicity reveals nothing more than extensive factual reporting of the evidence given and events occurring at trial.[155] Considering the trial publicity as a whole, nothing is more obvious than the clearly erroneous characterization thereof by the District Judge. The "plethora of prejudicial" publicity actually consists of but isolated instances of what petitioner insists is the most damaging publicity possible. The significance of the insignificant quantity but emphasizes the lack of justification for presuming the jurors even read the articles claimed by petitioner to have fatally infected his trial—unless, of course, we are willing to presume that which petitioner urges. He implicity contends that these jurors were without any conscience and completely disregarded their oaths and the trial court's constant admonitions, not to mention

154. Although greater in quantity and more sensational in nature than can be called conducive to the search for truth respondent here advocates, it should be pointed out to the court that the volume of publicity, although large, is not as great as petitioner would have us believe. The five scrapbooks before the Court (Petitioner's Ex. Vol. 1, Vol. II, Vol. III, Vol. IV, and Vol. V) contain substantially all of the publicity produced in Cuyahoga County before, during and after the trial covering a period from July 4, 1954 through December 31, 1954, of six months. Further, the exhibits represent the publicity not only in Cuyahoga County but out-of-town, out-of-state, and foreign. They represent 180 days worth of newspaper publication by three different Cleveland newspapers, two of which published at least two and usually more editions per day. This is not to minimize the amount published but only points out that the volume of publicity reaching any one person or prospective juror was far less than would appear.

155. Petitioner makes no claim that these newspaper articles are inaccurate.

that such a presumption implies mass perjury. Petitioner's failure to use all his peremptory challenges, his acceptance of the jury, his failure to request their sequestration, and his failure to avail himself of the opportunity of questioning the jurors as to actual contact with the publicity at the hearing on a motion for new trial[156] despite the fact that he subpoenaed three of them, is a significant indication that petitioner did not then consider as a possibility what he now urges this Court to presume without supporting evidence.

Turning to the specific instances of allegedly prejudicial publicity, we are confronted with an article headlined "But Who Will Speak For Marilyn" appearing October 23, 1954 on the front page of the Cleveland Press[157] and described by the District Court as "one of the most prejudicial" in that it "literally screamed for petitioner's conviction."[158] Containing no testimony at all, it was cheap sensationalism attempting to evoke sympathy for the murdered Marilyn Sheppard. While it needs no explanation and certainly deserves no justification, respondent accepts petitioner's invitation to provide mitigation for it even though respondent cannot imagine this article having any other effect than disgust for its writer. What could be more evoking of sympathy for the murder victim than this innocuous article? The grim, revolting, color slides placed before the jury and showing the unbelievable injuries produced by thirty-five crushing blows to the victim's head. Nevertheless, numerous jurors stated after trial they felt sorry for petitioner.[159]

The other "glaring examples"[160] of prejudicial trial publicity are the articles headlined " 'Bare-Faced Liar' Kerr

156. Tr 7033 et seq.
157. Rs 126
158. Ra 436a-437a
159. Appendices J, K, L, & M
160. Ra 444a

Says of Sam" and "Sam Called A 'Jekyll-Hyde By Marilyn, Cousin To Testify" both of which were previously discussed at pages 65-66 of this brief. Respondent respectfully urges the reader to at this time refer back to that discussion. Respondent only adds here that in regard to the "Jekyll-Hyde" article as far as the petitioner's character is concerned, he was present throughout the trial and took the stand in his own behalf. It seems extremely unlikely that this article could have possibly had any significant effect on the jurors since petitioner was available for observation in person, even if it came to the attention of the jurors. As to the "Bare-Faced Liar" article, if it was ever read by the jurors, reports of what the jurors considered during deliberations[161] completely destroys any possibility that the article had a prejudicial effect. Compared with what was introduced at trial, this article becomes significantly insignificant.

The remaining two instances of prejudicial publicity consists of two radio broadcasts. One of these broadcasts was made by Walter Winchell at 9 P.M. on December 5, 1954 reporting the assertions of a girl under arrest in New York for armed robbery that petitioner was the father of her illegitimate child.[162] When questioned, two jurors readily admitted hearing the broadcast, but both stated they would not be influenced by it.[163] The trial judge admonished them to "confine ourselves to this courtroom, if you please" after stating that such "scavenging" had "no place whatever in our thinking or considerations or thoughts in any way, shape, or manner in this case."[164] Since considerable evidence of petitioner's marital infidelity was already before the jury,[165] it again seems unlikely the broadcast could

161. Appendices J, K, L, & M
162. Tr 5427
163. Tr 5430
164. Tr 5430
165. Pros. Wit. Susan Hayes, Tr 4830 & 5013

have had any significant effect on the jurors. The other broadcast was made by Robert Considine at 6:30 P.M. on November 21, 1954 during which he made a comparison between defendant and convicted perjurer Alger Hiss.[166] Although the court refused to interrogate the jurors during the trial, petitioner had ample opportunity to do so at the hearing on his motion for a new trial.[167] Further, there is not the first indication that the jury heard the broadcast. Even so, there was at the time, ample evidence that petitioner had been less than truthful as noted in Part I of this brief.

With the exception of the Winchell Broadcast, none of the above prejudicial publicity has ever been shown to have reached the jury despite the fact that petitioner had ample opportunity to at least determine that the jurors had heard the broadcasts or read the publicity. Further, the probability of their prejudicial effect is extremely remote, if at all possible, when one considers that nothing contained in either newspaper or radio publicity had not been put into evidence at the trial.[168] In view of the searching inquiry made by the jurors, their concern for the presumption of his innocence, the length of their deliberations, and their overall fairness to petitioner exhibited in Appendices J, K, L, & M *infra*, petitioner's claims of due process deprivations are obviously without substance and certainly do not, either singly or in conjunction, present a situation infused with such a probability of unfairnes as to justify a presumption of inherent prejudice.

Petitioner's contentions have even less force when the trial judge, best able to evaluate the probability of preju-

166. Tr 3723
167. Tr 7033
168. Compare *Marshall v. United States*, 360 U.S. 310, (1959) in which inadmissible evidence ***NOT*** presented at trial but which ***DID*** reach the jury was considered no more than reversible error in this Court's exercise of supervisory power over the lower Federal courts.

dice, did not deem the one contact by the jurors with publicity to be prejudicial to the petitioner. The trial judge has a large measure of discretion in ruling on such matters and his determination should not be taken lightly.[169] Neither have all the Ohio courts which have reviewed this case found error therein.

That his trial was fatally infected with a fundamental unfairness is further asserted by petitioner because the jurors after retiring for deliberations on the verdict made unauthorized telephone calls to their families.[170] Petitioner maintains that these unauthorized communications are presumptively prejudicial and denied him his right to a fair trial. The testimony of Bailiff Francis, taken at the hearing on the motion for a new trial, appears as follows:

"Q. Do you know, of your own knowledge, whether there was any telephone communications made out of any of the respective rooms that were occupied by any members of the jury?

"A. Their phones were cut out, Mr. Garmone.

"Q. And were there any telephone calls made from the room that you occupied?

"A. Yes, sir.

"Q. Did you make the calls, or did the jury make the calls?

"A. No. The jury made the calls, and I sat in the chair right alongside the telephone.

* * * * * * * * *

"Q. Mr. Bailiff, what was the purpose of the calls that the jurors made in your presence?

* * * * * * * * *

"A. Well, they were made to their husbands and wives, and those that had children, they talked to the children.

"Q. Was there any conversation whatsoever about this case or their deliberations?

"A. Not one word, Mr. Parrino."

169. *Reynolds v. United States, supra; Spies v. Illinois, supra; Holt v. United States, supra.*

170. TR 7083

These telephone calls were assigned as error on appeal but were found by the Ohio Supreme Court to be insufficient cause for reversal.[171] Here again we are not presented with any evidence of actual juror prejudice resulting from these communications despite the fact that petitioner had the opportunity after trial to inquire of the jurors present at the hearing on the motion for a new trial what communication they received. When we are faced with a possibility of juror prejudice resulting from unauthorized communications the matter must to a large extent be left to the discretion of a trial court.[172] Judge Blythin did not find any indication that the prejudicial communications were made to the jurors which would require a new trial.

Again we are faced with the necessity for determining the probability of essential unfairness resulting from this situation. All jurors were properly permitted to associate with their families throughout the trial. It would seem incongruous to presume that a member of the family would choose this particular time to transmit a prejudicial opinion to a juror. Keeping in mind the presumption that jurors remain true to their instructions and realizing that petitioner neglected to show that the jurors did in fact receive prejudicial communications can but lead us to the conclusion that, while possible, the probability of unfairness is too remote to presume a denial of petitioner's constitutional rights.

Petitioner does not draw any support for his position from such cases as *Mattox v. United States*[173] and *Turner v. Louisiana*.[174] *Mattox* involved a direct review of a lower Federal Court trial in the exercise of this court's super-

171. *State v. Sheppard*, 165 Ohio St. 293, 298-299 (1956)
172. See cases cited *supra* note 169.
173. 146 U.S. 140 (1892)
174. 379 U.S. 466 (1965)

visory authority. In addition there was uncontroverted evidence that the jurors in *Mattox* actually came in contact with prejudicial material. *Turner* likewise presented a case wherein the jurors were shown to have had actual contact with prosecution witnesses *outside the courtroom* where they were able to assess the credibility of those witnesses by continuous and intimate association without the protection of courtroom procedures. Both cases were quite inapposite to the situation presented here. The probability of unfairness as in all other claimed constitutional errors is too remote to justify the presumption of constitutional infirmity in petitioner's trial. It should be pointed out once again that there exists evidence in this record that the jurors had instructed the families not to discuss the case with them and that their friends and relatives did not do so.[175]

Before proceeding on to other claimed constitutional violations, respondent wishes to point out that the District Court considered the cumulative effect of the foregoing opportunities for juror prejudice to have been inherently prejudicial to the accused. Respondent does not deny that in some circumstances single defects in an accused's trial may not by themselves rise to constitutional proportions but in their conjunction be a denial of the right for a fair trial. In the present case the most that can be said is that the publicity was not prejudicial in the context in which it was produced and that the combination of these opportunities for prejudice in the absence of some showing of a connection with the jury cannot be deemed to have denied petitioner his constitutional rights.

175. See footnote 134 and footnote 152

B. Fair and Impartial Judge

With the same impunity that petitioner ascribes, failure of the jurors to fulfill their constitutional duty to provide him with a fair and impartial trial, the petitioner urges us to presume that the "prejudice" of the trial judge denied him his right to a fair and impartial trial. The basis of the alleged partially of Judge Blythin consists of statements he was purported to have made prior to the commencement of the trial.[176] The affidavit attributing to Judge Blythin's expressions that he believed Sam Sheppard guilty are unsworn, uncorroborated, and incapable of being denied by the now deceased trial judge. Yet the District Court considered these affidavits as uncontroverted evidence of the fact that such statements were made. Further, the evidence revealed that while the affiant Murray was able to recall the exact words by Judge Blythin he could not recall the three or four other people allegedly present at the time the statements were made. While not strictly speaking uncontroverted, the unsupported statements alleging the prejudicial remarks of the trial judge are not at all consistent with the *sworn* affidavit of Mr. Garmone.[177] Mr. Garmone made clear that Judge Blythin was anxious to afford petitioner a fair trial and that he would most willingly excuse himself from sitting on the court if defense counsel so desired. The trial judge, however, assured defense counsel that he could sit and hear the case without prejudice. Petitioner's trial counsel were obviously quite satisfied in the impartiality of Judge Blythin.[178]

Respondent readily agrees that it is indeed axiomatic that the right to a fair trial includes the right to an im-

176. Ra. 387a & 391a
177. Ra. 383a
178. Ra. 384a

partial judge, but who could be more concerned in securing a fair trial than defense counsel themselves? It would seem that counsel retained by petitioner, who knew personally and were able to observe intimately the trial judge, would not have let such a situation pass but would have availed themselves of the simple remedy of filing an affidavit of prejudice. While the unsworn statements of Kilgallen and Murray would indicate a possible prejudice on the part of Judge Blythin, the affidavit of petitioner's trial counsel unequivocally indicates that Judge Blythin stated he had no fixed anticipatory judgment and that he had no hostile feeling toward the accused.

It should be remembered that the trial judge in this case was not the trier of facts. It fell solely upon the jury to determine the guilt or innocence of the petitioner. Even assuming, arguendo, that Judge Blythin did hold a prejudicial opinion petitioner has pointed to no conduct on the part of the trial judge which indicates he was unfair to Sam Sheppard. Judges are no less human than jurors and it cannot be required, especially in these days, that judges be totally ignorant of the facts and issues involved nor can it be expected that they cannot have formed some opinion as to the merits of the case. But to hold that the mere existence of a prejudiced opinion in the mind of a trial judge would without showing some manifestation thereof in the trial proceeding would be to establish an impossible standard. The trial judge here had no direct pecuniary or personal interest in the outcome of this case. To assert that the forthcoming judicial election would have influenced the judge to deny petitioner his constitutional rights approaches the zenith of cynicism, especially in view of the fact that many felt sorry for petitioner. A review of the trial transcript clearly indicates the sincerity and earnestness with which this judge presided over petitioner's trial.

His patience, with the dialectics and frequent defiance of defendant's counsel is incomparable. His instructions to the jury bespeak his personal awareness of the seriousness of the matter before him and his respect for the law. Petitioner cannot point out with any particularity wherein he was prejudiced in the conduct of his trial even if we assume the trial judge had some opinion. Since we are concerned with actual fairness to the accused, petitioner's claim seems significantly hollow and unfounded. Such claims by petitioner are but further examples of a desperate grab for straw-men on whose backs he may ride to freedom. Again we are asked to speculate upon a matter so serious it involves the reputation of a long-time state trial judge and implicitly impugns the integrity of everyone which the record shows to have been so concerned with affording petitioner more than that fundamental fairness required by the Constitution.

C. Lie Detector Evidence

Pretrial publicity frequently referred to Petitioner's refusal to submit to a lie detector test. Some of this publicity was a direct result of Petitioner's voluntary statements, both sworn and unsworn, oral and written. The fact that the Petitioner had refused a lie test was initially introduced at trial without defense objection. On the contrary, such refusal was freely discussed on direct, cross, redirect and recross examination, testified to the Petitioner himself and alluded to by both prosecution defense counsel and closing arguments. While now claiming introduction of this evidence to be constitutional error, Petitioner, twelve years ago, did not assign its sufficient significance to assign as error on appeal.

Petitioner first made objection to introduction into evidence the fact of his refusal to take a lie detector test

at the introduction of State's Exhibit No. 48, offered into evidence at page 3610 and received at page 3614 of the trial record. This was after the evidence had already been put before the jury without objection during the testimony of Officer Drenkhan. However, State's Exhibit 48 was a voluntary written statement given to the police in the presence of defense attorneys. Further, despite the above objection, Petitioner, when testifying in his own behalf on direct examination, discussed his initial willingness to take a lie detector test.

Whether or not introduction of such evidence (failure to take a lie detector test) is of a constitutional magnitude is questionable. Nevertheless any complaint in this regard petitioner may have had, he clearly waived such a claim by his obvious and deliberate failure to preserve it as error.

IV. OTHER CLAIMS OF DUE PROCESS DEPRIVATIONS

A. Proper Review By The Court of Appeals

Petitioner's claim in this respect is clearly without substance.

The District Court indicated clearly[179] that its decision was based upon a consideration of only part of the twenty-three stipulated issues.[180] Respondent appealed the decision of the District Court basing its argument upon the erroneous finding of facts and conclusions of law made by the District Court in relation to those stipulated issues considered by that Court. Petitioner was obviously apprised of this fact by respondent's brief in the Court of Appeals and admitted the knowledge thereof in his own brief in that Court. Yet, petitioner did not argue the other claimed constitutional violations in his brief before the Court of Appeals, but stated therein that to the extent these additional issues may be entitled to some consideration, we will stand upon the argument addressed to them in the Brief for Petitioner in the District Court.[181]

Respondent wishes to point out that all of the stipulated issues before, but not considered by, the District Court with the exception of stipulated issues numbered 18, 19, and 21[182] were before the District Court on a stipulated set of facts contained in Pre-Trial Order No. 4.[183] Although petitioner had the opportunity,[184] he did not subsequently present any evidence to substantiate the latter three issues and should not now be heard to say that he was deprived of a proper review thereon in the Court below.

179. Ra. 404a & 476a
180. Ra. 398a-401a
181. Ra. 151-237a, 300-352a
182. Ra. 400a
183. Ra. 150a (6)
184. Ra. 150a (16)

A reading of the two briefs submitted by petitioner to the District Court[185] shows clearly that petitioner evidently did not consider stipulated issues 18, 19, and 21 important because, although he would stand upon his argument of them in his briefs to the District Court, those briefs contain no argument addressed thereto.

Although petitioner now feels that he was denied due process of law because he claims the Court of Appeals did not adequately consider these issues, he evidently did not think the total failure of the District Court to consider them at all a sufficient denial of due process of law to even assign such failure to consider them, as error in a cross-appeal. Having failed to do so the petitioner now desires this Court to review on certiorari an alleged error in the Court of Appeals which, when committed in a larger magnitude by the District Court deciding in petitioner's favor, was not even pressed by him in the Court of Appeals. Petitioner was of the opinion, that the Court of Appeals could, if it disagreed with the District Court decision, either remand or decide itself the issues not considered by the District Court. Upon a stipulated set of facts the Court of Appeals considered the stipulated issues not considered by the District Court. The Court of Appeals took this case under consideration after oral argument on the 9th day of October, 1954 and rendered its decision consisting of some 80 pages on the 5th day of May, 1965. In that decision the Court of Appeals stated "... we consider that the case made in the District Court is before us and we have considered and found without merit the other claims of constitutional vice in the judgment convicting Dr. Sheppard."[186] And, as the dissenting

185. Ra. 151a & 300a
186. Rs. 57

judge remarked, "My brothers, . . . have written a careful and scholarly opinion."[187]

For the petitioner to say, after seven months consideration of this case by the Court of Appeals, after that Court stated it *did* consider all the issues, after the petitioner himself did not press consideration of all the issues upon that Court, is for him to unnecessarily impugn the sincerity and conscientiousness of the Court of Appeals. The Court of Appeals did consider all the issues. But after asserting that they did not do so adequately, petitioner cites not that first instance which even hints at substantiating his claim or in what particulars the Court of Appeals denied him a full and fair review, except for the fact that they did not write at length in their opinion concerning the issues not considered by the District Court.

Respondent is sure that the Court will agree that petitioner has failed to present anything in the nature of "special and important reasons" for which the Court will grant certiorari, let alone an error of such magnitude as to constitute a denial of due process.

B. The Other Constitutional Violations

Petitioner claims a denial of counsel at his arraignment was a violation of his constitutional rights, however, the record makes clear that Petitioner was afforded counsel of his own choice from the day of the murder until the present time and he does not point to any particular in which he was prejudiced by the lack of counsel at arraignment.

Petitioner also alleges that he was denied his constitutional right to a fair trial by reason of the seizure of his house by police officials, thereby preventing him from

187. Rs. 92

developing evidence to support his defense. The testimony of Chief Eaton[181] shows that Petitioner was not refused access to his house but only that a police officer accompany him to the house and that control of the *keys* would be retained in the possession of the Bay Village authorities and/or the Cleveland police.

CONCLUSION

> "As proud as we are of the great traditions of our courts and their concern for the rights of those accused of crime, we are aware that like all human institutions they seldom act with perfection. It is not difficult, after ten years of searching analysis and contemplative study and the announcement of some new judicial attitudes, to find some imperfections in the conduct of a trial and to conclude that a judge or any attorney could have done a better job. But stability of the law and a nation's respect for its courts will disappear if, long after the event, their judgment may be set aside because a trial judge's discretion was less than perfectly exercised or because it is thought that the trial plan of defense counsel was not the best that could have been employed. This must be especially true where an accused has enjoyed adequate and full opportunities for appellate review."

Respondent respectfully urges this Court to affirm the decision rendered by the United States Court of Appeals for the Sixth Circuit in this case and to order that Court to forthwith issue its mandate.

Respectfully submitted,

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181. Tr. 6062-6078

FEB 1 4 1966

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 490.

SAMUEL H. SHEPPARD,
Petitioner,

v.

E. L. MAXWELL, Warden,
Respondent.

BRIEF AMICUS CURIAE ON THE MERITS ON BEHALF OF THE STATE OF OHIO.

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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 490.

SAMUEL H. SHEPPARD,

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E. L. MAXWELL, Warden,

Respondent.

BRIEF AMICUS CURIAE ON THE MERITS ON BEHALF OF THE STATE OF OHIO.

To the Honorable the Chief Justice and Justices of the Supreme Court of the United States:

The Prosecuting Attorney of Cuyahoga County, Ohio, as the authorized law officer thereof, is herewith filing a brief amicus curiae on the merits in the above entitled case, for consideration by this Court in the disposition of this case.

STATEMENT OF FACTS.

The omission in the agreed statement of facts filed in the District Court (in which proceeding we took no part) of all of the pertinent evidence presented by the State in the trial of this case, necessitates our directing the attention of this Court to an objective statement of the evidence as set forth in the opinion of the Court of Appeals of Cuyahoga County (R. 64a-80a).

The State proved by direct and circumstantial evidence that Marilyn Sheppard was brutally murdered in her bedroom sometime between 3 and 4 a.m. on the morning of July 4th, 1954; that at the time she was murdered the only person in that home, except a six year old son, was her husband, the petitioner. It was conclusive from the evidence that there was a simulated burglary and that nobody but the petitioner had the time and exclusive opportunity to fake such a burglary to divert suspicion from himself. The evidence was so overwhelming that the burglary set-up was a fake that even counsel for the defense was obliged to say to the jury:

> "Well, of course, we don't claim there was a burglary. I mean I don't know why the intruder was there. We claim there was a man there, but whether he was there for a burglary or not, I don't know. We never claimed that he was." (Tr. 62, Supp.)

The jury was fully justified in concluding that the only one who was in a position to and had the time, and who actually did set up this fake burglary was the petitioner.

That the story told by the petitioner about the bushy-haired "form" in the house, and on another occasion "forms" (he wasn't sure whether there was one or two "forms") was concocted, is shown by the evidence.

The evidence established that Dr. Lester Hoversten visited the petitioner at Bay View Hospital on July 5th, at which time Dr. Steve came into the room, was irritated and stated that he had left strict orders that no one was to see Sam unless he, Dr. Steve, was first notified (Tr. 3803).

Dr. Hoversten testified relative to that incident as follows:

> "Q. Did Steve leave at any time after he came in?

A. Yes. After speaking sharply to me, he turned on his heel and walked quickly out of the room, and then he came back in just a few minutes.

Q. And when he came back in, did he say anything?

A. Yes. I remember I was sitting on the left hand side of the bed, and Steve sat near the foot of the bed, and he advised Dr. Sam to go over in his mind several times a day—

As I recall, Dr. Steve addressed Dr. Sam, and said in words to this effect, 'You should review in your mind several times a day the sequence of events as they happened so that you will have your story straight when questioned,' and then he gave as an example, 'You were upstairs, you went downstairs, and from here to there,' and so forth." (Tr. 3812-13.)

The fantastic stories told by the petitioner were so unreasonable and absurd as to be, in the opinion of the jury, unworthy of credence.

The Court of Appeals of Cuyahoga County, after giving in its opinion a summary of much of the evidence dealing with many of the physical facts and conditions of the premises as found on July 4th and of the declarations and actions of the parties involved as testified to by the public authorities and other witnesses, together with what the defendant said to others and in his testimony upon trial in relation to the events of the morning, said:

"The testimony of the defendant, in dealing with the events that took place in his presence or the things that he did, was characterized by the State as vague, indefinite, uncertain or factually highly improbable. During the time he was under cross-examination the defendant gave evasive answers such as 'I can't recall' or 'I can't remember,' approximately 216 times to questions concerning facts and circumstances that took place in his claimed presence material to the issues in the case.

"The jury, under the instruction of the court, was presented with but one question or issue of fact and that was, had the State shown beyond reasonable doubt that the defendant purposely killed Marilyn Sheppard?

"The State's case is based in part on circumstantial evidence. The law of Ohio on this subject requires that the facts and circumstances upon which the theory of guilt is based must be established beyond a reasonable doubt and the facts so established must be entirely irreconcilable with any claim or theory of innocence and admit of no other hypothesis than the guilt of the accused. Carter vs. State, 4 Oh. App. 193.

"If, therefore, the jury, after careful deliberation, found that there was any possible hypothesis of innocence, after a consideration of all of the evidence, then the defendant would be legally entitled to be discharged, but if the jury found, after full deliberation, there was no possible hypothesis of innocence based on the facts as they found them to be and that the facts found are such as to be irreconcilable with any other reasonable hypothesis, than the guilt of the accused, then a verdict was required.

"This was a jury question and *we hold that there was sufficient evidence to support the verdict of guilty as found by the jury.*" (Emphasis ours.)

Reference is made in the petition (p. 10) to the injuries allegedly sustained by the petitioner. Petitioner's injuries were the subject of conflicting testimony on the trial. Whatever injuries the petitioner sustained, he claimed they were caused by a blow or blows of the fist of the assailant that he encountered in the bedroom where his wife came to her death as a result of many blows on the head with a blunt instrument. It was on this occasion and only then, that the petitioner claimed that there might have been two assailants, "one working over his wife" and

the other striking the petitioner from the back with his fist. While petitioner was "chasing" the "form" to the beach (instead of summoning help for his wife), there was no suggestion that there was more than one object or form in front of him.

Reference is made in the petitioner's brief to the use of the words "grilling" and "third degree" in a newspaper editorial (considered by this Court in the former petition). Those expressions are frequently applied to a thorough interrogation and do not at all necessarily mean the use of force or violence. No one laid a hand on the petitioner. Further, that editorial appeared months before the trial.

The transcript of the bail hearing which appears in the Appendix to the petition is not complete (s.164). The complete answer of the foreman explaining the "pressure" was as follows:

> "Q. What was the pressure that was placed on you?
>
> A. *Only curious people who wanted to know what we knew on the Grand Jury.*" (Emphasis ours.)

The pressure was for information and not, as suggested, to indict the petitioner.

No evidence was proffered by the State on the trial of this case that the petitioner refused to take a truth serum test. His brother, Dr. Steve Sheppard, a defense witness, testified on cross-examination and re-direct as an expert on the use of the drug sodium pentothal; that its common use is for anesthesia and that its use as a truth serum has been condemned.

SUMMARY OF ARGUMENT.

In reversing this State court conviction, the District Judge bottomed his decision on four separate grounds, (1) newspaper publicity before and during the trial denied Sheppard a fair trial, (2) the trial judge should have disqualified himself (not assigned as error in the State courts), (3) evidence that Sheppard had refused to take a lie detector test (not assigned as error in the State courts) and that another witness had taken such a test was improperly brought before the jury, and (4) the bailiffs in charge of the jury after the cause was submitted to it improperly allowed individual jurors to make telephone calls to their families.

On the aspect of publicity, the District Judge relied mainly upon this Court's holdings in *Irvin v. Dowd*, 366 U. S. 717 (1961) and *Rideau v. Louisiana*, 373 U. S. 723 (1963), decisions which were rendered by this Court some years after the case at bar was finally adjudicated on the merits and certiorari was denied, *State v. Sheppard*, 352 U. S. 910 (1956) and *State v. Sheppard*, 352 U. S. 955 (1956). There is to be found in the decision of the District Judge no independent evaluation of the voir dire testimony, as this Court held should be done, *Irvin v. Dowd*, *supra*. This task was performed by the Court of Appeals. As the majority of the Court of Appeals said, neither *Irvin* nor *Rideau* support a holding that the jurors' testimony had to be rejected by the trial judge and that a fair jury could not possibly have been obtained in this case.

In holding that the trial judge was not a fair and an impartial judge in the trial of this case and should have disqualified himself, the District Judge gave credence to an unsworn statement made by a former Cuyahoga County employee to the effect that in July, 1954, the trial judge allegedly said that he (Sheppard) was guilty, and to an

unsworn statement made by Dorothy Kilgallen (she was not cross-examined) to the effect that the trial judge allegedly said to her that Sheppard was "guilty as hell" and that the case was "open and shut." These statements were made ten years after the trial and at a time when they could not be rebutted because the trial judge was deceased. The statements were therefore incompetent as hearsay.

The District Judge also cited in support of his finding that the trial judge should have disqualified himself, the decisions in *State, ex rel. Pratt v. Weygandt, Chief Justice*, 164 O. S. 463, 132 N. E. (2d) 191 (1956); *Tumey v. Ohio*, 273 U. S. 510, 71 L. Ed. 749 (1927); and, *In re Murchison*, 349 U. S. 133, 99 L. Ed. 942 (1955), which are completely inapposite. The trial judge in the case at bar was not the trier of the facts. Nor is there any basis in the record of the trial of this case for any finding that the trial judge lacked integrity and did not discharge his duties conscientiously, carefully, and with dignity and due regard for the constitutional rights of the petitioner to a fair trial. And, most important in the habeas corpus record, is a statement by one of the original defense counsel, relating that Judge Blythin offered to disqualify himself if defense counsel wished, but they were satisfied that he would be fair and impartial and did not file any affidavit of bias and prejudice. (R. 382a.)

Nor were any appellate remedies withheld from this petitioner as was the case in *Fay v. Noia*, 372 U. S. 391, a decision which the District Judge held applicable in connection with his finding on the lie detector testimony, which had not been assigned as error in the State courts. Nor is there any evidentiary showing that the petitioner was denied due process of law on this issue.

There is no evidentiary showing in this case that the jurors' calls to their homes contained any improprieties.

Not mentioned by the District Judge or by the dissenting opinion is the testimony of bailiff Francis taken at the hearing on the motion for new trial, showing that the telephone calls made by the jurors to members of their families were harmless (Tr. 7084-7085).

The laws of the State of Ohio provide for a motion for new trial and upon the hearing of that motion, the affidavits and testimony of the jurors may be received, *Emmert v. State*, 127 O. S. 235; *State v. Joseph*, 90 O. A. 427. Although several jurors were subpoenaed and were interrogated by defense counsel at the hearing on the motion for new trial, not a word of testimony was produced to justify the defense claim that the jurors were influenced by anything other than the evidence produced in open court, in reaching their verdict. The claim that they were influenced by new stories or any other outside influence is not supported by the record.

And the majority opinion of the United States Court of Appeals in the proceeding here involved, states:

> "1) *Publicity.*
>
> "We should at the outset confess a certain temptation to yield to today's accelerating current of excitement and concern about undue press coverage of criminal charges and trials, and to affirm petitioner's release as dramatic vindication of the bar's contention that some of its own members and some of the various media of information have by misuse of their rights prevented our courts from according fair trial to all who are accused of crime. Doubts as to the efficacy and propriety of such action, however, are supplemented by the certain knowledge that it is our duty as federal judges to avoid a state judgment of conviction only where some constitutional infirmity may be found. Careful consideration of this case leads to the conclusion that no such infirmity infects Dr. Sheppard's conviction." (Pet. App. A, s.6-s.7.)

The American Civil Liberties Union and its Ohio affiliate, hereinafter referred to in this brief as the ACLU, in their Amici brief ask this Court to restrict the exercise of the First Amendment Freedoms by certain of the citizenry and to require the State trial courts to do likewise when a crime has been committed.

The discrimination which the ACLU seeks to have this Court apply against certain of the citizenry such as law enforcement officers and the news media is not only prohibited by the First Amendment and the Fourteenth Amendment, but by Article I, Section 11 of the Ohio Constitution, which provides:

> "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libellous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted."

As this Court said, in *New York Times v. Sullivan*, 11 L. Ed. 2d 1109 (1965), by Mr. Justice Goldberg in a concurring opinion:

> "The theory of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false or malicious * * *."
>
> "Such criticism cannot in my opinion be muzzled or deterred by the courts * * *."

The Fourteenth Amendment protects the First Amendment freedoms against abridgement by state action, so that a State court has no constitutional authority to interfere with the exercise of the First Amendment free-

doms, and the trial court in the case at bar recognized this limitation of its authority. The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. *Smith v. California,* 361 U. S. 147 (1959); *Talley v. California,* 362 U. S. 60 (1960); *NAACP v. Flowers,* 377 U. S. 288 (1964); *NAACP v. Button,* 371 U. S. 415 (1963).

This is not a case where law enforcement agencies were making any public statements concerning progress of investigation of a crime or proof already obtained as to the complicity of any person. The publicity that occurred during the investigation of this crime shows just the opposite. The news media were criticizing the law enforcement agencies because of a lack of progress in the solution of the crime. Nor were there any public statements by law enforcement officers during the investigation that any proof or any confession had been obtained as to the complicity of the petitioner in the murder.

The publicity that occurred in this case was engendered by the petitioner's own acts and was not a one-way thoroughfare. The petitioner, members of his family and his counsel were fairly prolific in the exercise of the First Amendment freedoms in their statements to the newspapers for publication and public consumption before and during the trial, as will hereinafter be noted in this brief.

There was no conflict between the exercise of the First Amendment freedoms and a fair trial in this case. If the evidence offered on the trial itself was not sufficient to convict, or any other constitutional guaranty to a fair trial was violated on the trial itself, remedy was provided by due process of law in the courts, regardless of what anybody had to say about the case in the news media or elsewhere before or during the trial.

ARGUMENT.

INTRODUCTORY STATEMENT.

The newspaper articles, headlines and other newspaper material contained in the District Court's decision, in the dissenting opinion in the Court of Appeals, in the petitioner's brief and in the ACLU Amici brief were not offered in evidence by the prosecution on the trial, nor were they received in evidence for the consideration of the jury in the trial of this case, and the claim that the trial jury was influenced in reaching its verdict by this newspaper material, rather than by the evidence produced in open court, is merely the assertion of the District Judge, the dissenting judge, petitioner's present counsel and counsel for the ACLU Amici.

It is therefore not within our province to explain or defend anything that appeared in a newspaper, favorable or unfavorable, since these newspaper articles and headlines were not offered in evidence by the prosecution, or received in evidence by the trial court and any opinions or interpretations as to their meaning, such as rendered by the District Judge, the dissenting opinion, and as argued by present counsel for the petitioner and counsel for the ACLU in their briefs, are, under the circumstances, pointless. The argument then of both petitioner's counsel and counsel for the ACLU that much that was never offered and would have been inadmissible if offered at the trial, appeared in the newspapers, is also pointless, since the prosecution did not offer newspaper articles into the evidence for the consideration of the jury, and there is no proof that the jury were reading the papers or were influenced in reaching their verdict by anything other than the evidence produced in open court.

No factual proof has ever been offered in this case, either on the hearing on the motion for new trial when an

opportunity was afforded to interrogate the jurors, or on the direct appeal on the merits to this Court, or in the present habeas corpus proceeding, that the trial jury that was carefully selected, interrogated as to possible contacts with pre-trial publicity, and accepted by both sides in this case, were inherently suspect, lacked integrity and were untrue to their oaths to decide this case on the evidence produced in open court and on nothing else, as instructed by the trial court.

The claim that the Cleveland Press campaigned to have the petitioner arrested, indicted and convicted and that without the deliberate pressure of the Cleveland Press, there would have been no inquest, no arrest and no trial is a persecution complex adopted by the defense on the trial, in the hope of inoculating the trial jury and the courts with that persecution complex. This matter was under investigation by the authorities after the murder was committed. It was under investigation by the Prosecutor's office from July 7th, 1954 on and when we thought we had sufficient evidence to present to the Grand Jury, the case was presented to the Grand Jury. There was nothing forced here at all by the newspapers. We had the necessary evidence.

We had no help from the Cleveland Press or any other news media in painstakingly gathering together the scientific and other evidence that was offered by the prosecution to the Grand Jury and on the trial of this case, which the trial record shows established the guilt of this petitioner of the murder of his pregnant wife beyond a reasonable doubt, and present counsel for the petitioner does not point to any insufficiency in the evidence offered on the trial. Further, although this murder was committed, by his own admission, in the presence of the petitioner in his home, we received no help from the petitioner in the solution

of this crime. No husband ever displayed a more lackadaisical interest in helping to solve the murder of his wife than did this petitioner. His demeanor throughout the investigation was evasive and uncooperative. It was, then, the petitioner himself, by his actions after the murder of his wife was committed, and his public disclaimer of any knowledge as to who killed his wife, though he was present when she was killed, who brought about the barrage of publicity that occurred in this case.

It is ludicrous then, as the District Judge did, to hold the trial judge, the trial jury and the prosecution responsible for the petitioner's acts that resulted in the type of publicity that occurred in this case, criticizing the petitioner and criticizing the public officials.

If anyone had a "trial by newspaper" in this case, the trial judge, the trial jury and the prosecution did in this habeas corpus proceeding, for the decision of the District Judge shows that his findings against the trial judge, the trial jury and the prosecution are based substantially upon what he read in the newspapers, and not upon what the trial record shows. And these findings were made without giving the prosecution an opportunity to defend and be heard (Pre-trial Order No. 1). The proceeding was not open to the public, a practice condemned by this Court in *In Re Oliver*, 333 U. S. 257, 92 L. Ed. 682, 68 S. Ct. 499.

The decision of the District Judge shows further, that he made no independent evaluation of the voir dire testimony in reaching his conclusion that the trial jury lacked integrity.

Who should be in a position to know whether the trial jury, selected by both sides, was a fair and an impartial jury? The District Judge, who was not present, did not examine the voir dire and had no connection with the trial proceedings? Petitioner's present counsel and counsel for

the ACLU, who had no connection with the case and did not represent the petitioner on the trial? Or, defense counsel who represented the petitioner on the trial and took part in the selection of the jury? And, defense counsel who represented the petitioner on the trial and who were in a position to know and observe this jury throughout the trial, were satisfied that they had a fair and an impartial jury for they stated to the jury in argument:

> "May I take this opportunity—as I started to say, may I take this opportunity to congratulate you on the splendid attention, the tireless effort you have displayed during these nine weeks. You have been deprived, probably, of many comforts that you ordinarily enjoyed in and around your home with your family because of the *admonitions* that you have received throughout the trial by his Honor, Judge Blythin.
>
> "The purpose, ladies and gentlemen, of those admonitions was that we could come to this point in the lawsuit where your minds would be free, your minds would be open, and that you could take into consideration all the facts and all the testimony that has been submitted to you *without any outside influence*, and I am sure, and I say this to you sincerely, *because I have had the opportunity of observation during this entire period, that you have done just that.*" (Tr. 5371-5372.) (Emphasis ours.)

As a further demonstration of the confidence defense counsel who represented the petitioner at the trial had in this trial jury, an opportunity was accorded counsel on the hearing on the motion for new trial to interrogate the jurors, but they did not see fit to inquire into possible contacts with trial publicity.

I.

THE PETITIONER WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL.

The trial of this case started on October 18, 1954, some three and a half months after the crime was committed. When a motion for a change of venue and/or a continuance was made at the outset of the trial, because of the publicity that had occurred, the trial court said:

> "This court is not now in a position to know at all whether we can have a fair and impartial jury in this case. His belief, based on experience, is that we certainly can, but he certainly will not proceed with this case in this county at all if it appears by any reasonable picture that a fair and an impartial jury cannot be had." (Tr. 16.)

The trial court said further:

> "The motion for change of venue will be held in abeyance, and we will proceed at 1:15 this afternoon in an effort to determine whether or not we can secure a fair and impartial jury. If we are not able to do that, there will be no question in this court's mind at all but what this case ought to go out of Cuyahoga County, whatever may be the effect of that." (Tr. 18.)

The right to a change of venue is a statutory right in Ohio, subject to the sound discretion of the trial court to determine whether a fair and an impartial jury can be impanelled in the county wherein the crime was committed, *Richards v. State*, 43 O. App. 212, 183 N. E. 36. The only way in which that can be determined is to proceed to impanel a jury, which is what the trial court did in this case.

Further, the trial court was not required to speculate as to whether a trial at a later date would result in more or less publicity. The Constitution provides that the defendant in a criminal case is entitled to a speedy and

public trial. As it was, the petitioner was not brought to trial until three and a half months after the crime was committed, and the trial court was not required to delay the trial indefinitely, otherwise the petitioner could be heard to complain that his constitutional right to a speedy and public trial was violated. Counsel for the petitioner had applied for a continuance of the trial "to permit the extraordinary publicity to quiet down." It was not claimed that they were not prepared for trial, and, as the trial court stated: "nor was any suggestion made as to who was going to quiet down the publicity, nor when, nor how."

A. As to Publicity Before the Trial.

The jurors who sat in the trial of this case were fully examined so far as defense counsel who represented the petitioner on the trial desired as to any knowledge or information they might have of the case. At no stage of the proceedings in the trial court, on the hearing on the motion for new trial, or on the appeals did the petitioner offer any evidence to prove that any juror was in fact hostile, unqualified or prejudiced by the publicity, or was untrue to his oath to decide the case on the evidence produced in open court and on nothing else.

Juror Barrish is mentioned in the petitioner's brief (p. 32), together with the reason he gave for having read about the case. The further extended examination of Juror Barrish by both parties is omitted from the petitioner's brief and the defense omit to state that Juror Barrish was accepted by passing him for cause (R. 115) and that the defense had peremptory challenges which they chose not to exercise with reference to Juror Barrish.

Juror Borke is also mentioned in the petitioner's brief (p. 32). Here again, the extended examination of Juror Borke by both parties is omitted from the petitioner's brief,

showing that the defense were satisfied that Juror Borke would be an impartial juror, and they chose not to exercise a peremptory challenge with reference to this juror.

The Court of Appeals independently evaluated the voir dire testimony and said:

> "In determining whether Dr. Sheppard has carried the burden of demonstrating the unconstitutionality of his trial, surrounded as it was by pervasive publicity, it is our duty to review independently this voir dire examination of the prospective jurors in the state court. *Irvin v. Dowd*, 366 U. S. 717, 723 (1961); *United States ex rel. Bloeth v. Denno*, 313 F. (2) 364, 372 (CA 2, 1963), *cert. denied*, 372 U. S. 978 (1963); *United States ex rel. Brown v. Smith*, 306 F. (2) 596, 602 (CA 2, 1962), *cert. denied*, 372 U. S. 959 (1963); *Geagan v. Gavin, supra*, 292 F. (2) 246-47. The voir dire examination fills nearly 1600 pages in the record of the present case. Each prospective juror was questioned about his acquaintance with the pre-trial publicity, and each of those who ultimately returned the guilty verdict swore that such publicity had created in his mind no opinion as to the guilt or innocence of the defendant and would not affect his deliberations. A reading of the voir dire discloses its thoroughness and careful inquiry as to any effect that publicity might have had on the veniremen. We find it without substantial fault and neither has counsel pointed to any insufficiency or impropriety in it. * * *" (Pet. App. A, pp. s.11-s.12.)

The Court of Appeals also evaluated the pre-trial publicity, and stated:

> "It should be emphasized that nowhere in the news items is there any hint or suggestion that Dr. Sheppard confessed or admitted his guilt, or any claim that he had a criminal record or had been other than an exemplary citizen, or any clear assertion that the press

or the police had any direct evidence of his guilt. Comments to the press by police officials, and even prosecutors, occasionally exceeded the bounds of propriety, but they too revealed no more than that some thought that Dr. Sheppard was guilty. In addition to the pretrial publicity set forth in the District Court opinion, the Cleveland papers also published items emphasizing Dr. Sheppard's protestations of innocence." (Pet. App. A, p. s.15.)

As justification for failing to examine the trial record on the voir dire, the District Court pointed out that in *Rideau v. Louisiana*, 373 U. S. 723, 10 L. Ed. 2d 663, 83 S. Ct. 1417 (1963) the Supreme Court did not examine the transcript of the voir dire in reaching its determination as to prejudice and held in that case that the assurances of jurors on voir dire may be disregarded. But in the *Rideau* case, this Court was there considering conceded circumstances that on the voir dire, counsel for Rideau had requested that certain jurors who later decided the case, be excused for cause, and these challenges for cause had been denied by the trial judge.

Mr. Justice Stewart stated in the majority opinion, in *Rideau*, 373 U. S. at page 725:

"Three members of the jury which convicted him had stated on voir dire that they had seen and heard Rideau's televised 'interview' with the sheriff on at least one occasion. Two members of the jury were deputy sheriffs. Rideau's counsel had requested that these jurors be excused for cause, having exhausted all of their peremptory challenges, but these challenges for cause had been denied by the trial judge."

The District Court also cited *Irvin v. Dowd*, 366 U. S. 717, 6 L. Ed. 2d 751, 81 S. Ct. 1639. But again, in the *Irvin* case, the Supreme Court based its findings upon an examination of the trial record and held at page 756, 6 L.

Ed. 2d, that it is the duty of the federal court on habeas corpus to independently evaluate the voir dire testimony of the impaneled jurors.

There was no proof presented to the District Court by the petitioner, and the burden of proof was upon the petitioner, that the jury that was finally impaneled by both sides was not a fair and impartial jury as a result of publicity before the trial. Nor do the decisions cited by the District Court support the proposition that a court may, on habeas corpus, as the District Court has done, determine whether a defendant had a fair and impartial jury impaneled, by reading the newspapers, without regard to what the trial record shows. The court has indulged in speculation and conjecture about the adverse effect certain newspaper articles and headlines, occurring before the trial, may have had upon the jury that was selected in this case, and concludes on that basis alone, without any proof, that the petitioner did not have a fair and impartial jury.

It must be remembered that the Mayor of Bay Village was a close personal friend of the petitioner, as were the police officers in Bay Village for whom he was the police surgeon; that he was whisked off to Bay View Hospital by his brothers without permission before the Coroner or any of the Cleveland police officers arrived; that a protective shield was thrown around him and that the petitioner and his counsel would permit no interrogation except under their own terms and by designated friendly officers; and that the petitioner and his counsel were obstructing the public authorities in what should be the normal investigation of a murder.

It seemed, at least to the newspaper editors, that certain public officials were "sitting on their hands" and were fearful, for one reason or another, of proceeding vigorously in the investigation as they would in any other

case. Certainly, these newspapers had a right to criticize what they deemed to be a deliberate attempt to shield the petitioner from interrogation, and a lack of progress on the part of the public authorities in the investigation and solution of this crime. It was inevitable that there would be publicity concerning the petitioner's unwillingness to be interrogated save on his own terms and conditions and that the public officials would be criticized.

Whether we or the Courts agree or disagree with the opinions expressed by the newspaper editors is entirely beside the point. It is pertinent to ask: What caused the publicity before the trial, and who brought it about?

Marilyn Sheppard was murdered—there could be no doubt about that—and it became the duty of law enforcement officers to thoroughly investigate and to bring to justice the person who murdered her. Much of the publicity injected into the District Court's decision occurred months before the trial took place. The murder occurred on July 4th and the petitioner was not brought to trial until October 18th. A great deal of the newspaper publicity occurring before the trial was inspired by the lack of cooperation of the petitioner with the authorities beginning immediately after the murder of his wife was committed, by the protective shield thrown around him, and by the strategy of his counsel who was hired within hours after the murder. None of the publicity was deliberately promoted by the prosecution.

Any sensational murder such as this brings forth publicity, some more, some less, but in the circumstances of each case, the issue before the trial court is whether a fair and impartial jury can be obtained. The jurors who sat in the trial of this case were all thoroughly examined and definitely stated that they would give to the petitioner the benefit of the presumption of innocence. They were

fully examined so far as defense counsel desired as to any knowledge or information they might have of the case. At no stage of the proceedings in the trial court or on the appeals did the petitioner offer any evidence to prove that any juror was in fact hostile, unqualified or prejudiced by the publicity, and, moreover, a period of two months and a half intervened between the day of the petitioner's arrest and the beginning of the trial.

The presumption is that the jurors followed the instructions of the court. A distrust of the jury without any affirmative showing that they were not to be trusted in following out the court's instructions is what the District Judge and dissenting judge urge.

Mr. Justice Holmes said in *Holt v. United States,* 218 U. S. 245, at 251 (1910), 31 S. Ct. 2, 6, 54 L. Ed. 1021:

> "* * * If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trials under the conditions of the present day * * *"

In *United States v. Sorcey,* 7 Cir., 151 F. 2d 899, 903 (1945), certiorari denied, 327 U. S. 794, 66 S. Ct. 821, 90 L. Ed. 1021, the court stated:

> "* * * we must not permit the integrity of the jury to be assailed by mere suspicion and surmise; it is presumed that the jury will be true to their oath and conscientiously observe the instructions of the court, * * *"

In *Opper v. United States,* 348 U. S. 84, at 95 (1954), 75 S. Ct. 158, 165, 99 L. Ed. 101, the court said:

> "* * * Our theory of trial relies upon the ability of a jury to follow instructions. * * *"

In *Delli Paoli v. United States,* 352 U. S. 232, 242 (1957), 77 S. Ct. 294, 300, 1 L. Ed. 2d 278, the court said:

"* * * Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice."

In the instant case, the prospective jurors were questioned at very great length by both counsel for the State and the defense, and the Court. In fact, there are three volumes of the Bill of Exceptions, totaling hundreds of pages, setting forth such detailed examination. The fact that prospective jurors had read something about the case before they were sworn as jurors did not necessarily disqualify them. We know of no principle of law which excludes such jurors from service merely because they had previously read or heard something about the case. The persons who could hear the evidence without bias or prejudice and could decide the issues fairly and impartially were seated. Those who could not, were excused.

It was held in *Irvin v. Dowd, supra,* 6 L. Ed. 2d, at p. 756:

"It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the

presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Spies v. Illinois, 123 U. S. 131, 31 L. Ed. 80, 8 S. Ct. 21, 22; Holt v. United States, 218 U. S. 245, 54 L. Ed. 1021, 31 S. Ct. 2, 20 Ann. Cas. 1138."

The process of impaneling the jury in the Sheppard case demonstrated that there was no unusual difficulty in securing a fair and impartial jury. The analysis of this process is briefly stated in the opinion of the Court of Appeals of Cuyahoga County as follows:

"The record in this case discloses that a special venire was called for the trial of this defendant as provided by Sec. 2945.18 R. C. Seventy-five names were drawn from the jury box. Of this number, 11 were immediately excused for justifiable reasons or were not found, and could not be summoned (three in number) by the sheriff. Of the remaining 64, 13 were excused because they had formed a firm opinion as to the guilt or innocence of the accused and 10 were likewise excused because they were opposed to capital punishment. Sixteen others were excused for cause.

"The State used four peremptory challenges and the defendant five. As is provided in Sec. 2945.21 the State in a homicide case where there is but one defendant, is entitled to six such peremptory challenges and the defendant a like number so that when the jury was sworn, the defendant left the right to one peremptory challenge unused. From the foregoing analysis of the venire of 75 electors called in this case, four of those called were not needed in impaneling a jury of 12. Such jury was selected as provided by law and sworn and *accepted* by the defendant to well and truly try and true deliverance make between the State and the defendant.

"The parties agreed to select two alternate jurors as provided by Sec. 2313.37 R. C. The four remaining jurors of the original list, together with an additional venire of 24 summoned as provided by law, were used for this purpose. Of the 24 summoned, eight were called and questioned together with the four from the original venire, in impaneling the two alternate jurors. Of those examined, three were excused for holding a firm opinion of the guilt or innocence of the accused, four were excused as being against capital punishment, one was excused on challenge for cause and each side used one peremptory challenge. (Each side had the right to excuse two prospective alternate jurors peremptorily under the provisions of Sec. 2313.37 R. C.)

"The analysis of the impaneling of the jury in this case where but 16 prospective jurors out of 72 examined could not sit because they had prejudged the guilt or innocence of the accused, clearly shows that there was no difficulty whatever in impaneling a fair and impartial jury." (R. pp. 60a-61a.)

No matter when or where tried, the Sheppard case would have attracted widespread publicity. This was inherent in the very nature of the case itself. The right to grant a change of venue lies in the sound discretion of the trial court. The trial court stated on the motion for new trial in ruling on the denial of the motion for change of venue and/or for a continuance:

"(3) *Denial of change of venue requested by defendant.* The request, when made, was based upon the claim that extraordinary public attention centered upon the case in this county by the various media of news made the securing of a fair and impartial jury in this county impossible. It is a matter of common knowledge that the case commanded that same attention throughout Ohio and the United States of America. It commanded very much attention through-

out the free world. Chief counsel for the defense conceded and asserted this to be a fact and stated fervently that the defendant could not have a fair trial in Ohio, or even in the United States. The only conclusion from that assertion must be that the defendant cannot be tried at all on an indictment for Murder in the First Degree. Such a claim furnishes its own answer.

"Seldom indeed has there been a case about which the average citizen was so confused by the published stories, or more uncertain about what the facts actually were. With present-day means of communication the same precise stories were simultaneously published in every city and county in the State and it certainly will not be denied that Cuyahoga County is the most liberal county in the State and, as a result, the best in which to conduct a trial involving a much publicized charge of crime, whatever its nature. *It is to be borne in mind that no issues which break into flames and which tend to produce passion and prejudice were involved in this cause. No issue of race, corruption, killing an officer, or the like, was involved—what actually was involved was a mere mystery—a 'whodunit.'* The only safe and sure way to determine whether a fair and impartial jury can be secured is to proceed to impanel one. The court reserved ruling on the motion pending such an effort and became convinced, and is still convinced, that an intelligent, sincere, patriotic and fair jury was impaneled. Upon that being accomplished the court overruled the motion and believes such action was not error. Section 2945.06 Revised Code of Ohio provides that a person charged in a case such as this may waive trial by jury and elect to be tried by a panel of three judges. While not challenging the right of a defendant, in a proper case, to a change of venue it does seem that the lack of confidence in any jury anywhere, coupled with the failure to elect to be tried by a panel of three judges, smacks of objection to any trial at all. (Emphasis ours.)

"(4) *Error in denying application for continuance.* The crime charged in the indictment occurred on July 4. Trial started October 18. Defendant's counsel had been engaged and active from a time within hours following the crime and long before defendant's arrest. Seventy-five prospective jurors had been summoned with full knowledge of all counsel long before any application for continuance was filed. The only ground stated for a continuance was 'to permit the extraordinary publicity to quiet down.' It was not claimed that counsel were not prepared for trial nor was any suggestion made as to who was going to 'quiet down' the publicity, nor when or how." (R. pp. 35a-36a.)

As stated in the opinion of the Supreme Court of Ohio on this case:

"At the conclusion of the impaneling of 12 jurors, the motion for change of venue was renewed (for the third time), at which time, in overruling the motion, the trial court said:

'That the best evidence in the world is the effort to select a jury, and what we get here is a picture that has taken almost two weeks of time. The court is thoroughly satisfied that we have a fair and impartial group of people to try this case, and I doubt if under any conditions at any time anywhere in this state you could have a better looking group of people and a more intelligent group of people, as a whole, to try a case of this kind, and the court is thoroughly satisfied that they are a group of fair and impartial people who can properly try this case under the guidance of the court, and I hope he will be able to give them that in the manner that it ought to be given.'

"The same motion, advanced for the same reason, was renewed on five other occasions during the trial, and the trial court in each instance overruled the motion.

"We believe the trial court was justified in those rulings. In Townsend v. State, 17 C. C. (N. S.), 380, 25 C. D. 408, affirmed without written opinion in 88 Ohio St. 584, 106 N. E. 1083, it is said:

'The examination of jurors on their voir dire affords the best test as to whether or not prejudice exists in the community against the defendant; and where it appears that the opinions as to the guilt of the defendant of those called for examination for jurors are based on newspaper articles and that the opinions so formed are not fixed but would yield readily to evidence, it is not error to overrule an application for a change of venue.'

"For example, in Richards v. State, 43 Ohio App. 212, 183 N. E. 36, it was held that the exercise of the right to order a change of venue lies in the trial court's discretion, and that a refusal to order a change of venue without prejudice until it can be determined whether a fair and impartial jury can be impaneled is not an abuse of discretion. See also, Dorger v. State, 40 Ohio App. 415, 179 N. E. 143; State v. Stemen, 90 Ohio App. 309, 106 N. E. (2d) 662; State v. Deem, 154 Ohio St. 576, 97 N. E. (2d) 13.

"If the jury system is to remain a part of our system of jurisprudence, the courts and litigants must have faith in the inherent honesty of our citizens in performing their duty as jurors courageously and without fear or favor. Of the 75 prospective jurors called pursuant to this venire only 14 were excused because they had formed a firm opinion as to the guilt or innocence of the defendant. A full panel was accepted before this venire was exhausted, and defendant exercised but five of his allotted six peremptory challenges.

"In the light of these facts, and particularly in the light of the fact that a jury was impaneled and sworn to try this case fairly and impartially on the evidence and the law, this Court cannot say that the denial of

a change of venue by the trial judge constituted an abuse of discretion." (R. pp. 110a-111a.)

There were no unusual compelling circumstances in the Sheppard case requiring a disregard of the assurances of the jurors on the voir dire. The petitioner did not confess to the crime as was done by the defendant in the *Rideau* case, nor is there any showing in the instant case that any juror sat on the trial who was unqualified or unaccepted by the defense, as was the situation in *Rideau*.

It is argued in the petitioner's brief that the decisions rendered by this Court in *Rideau v. Louisiana, supra*, and *Irvin v. Dowd, supra*, are applicable to the case at bar, because "a confession claimed publicly to be hidden can be every bit as damaging to an accused facing trial as a confession claimed to have been articulated." (Pet. Br. p. 28.) We don't follow that argument. How can a public hidden confession be made? Here again, counsel for the petitioner attempts to give an opinion and an interpretation as to the meaning of newspaper articles which were not received in evidence on the trial of this case. And there was no confession in this case, either public or hidden.

Further, the instant case is not comparable with *Irvin v. Dowd, supra*, upon which the District Court relied. In the *Irvin* case, the prosecutor and police officials issued press releases stating that the defendant had confessed to six murders. At the trial, the jury panel consisted of 430 persons; 268 of these were excused for cause as having fixed opinions as to the guilt of the petitioner; and 8 of the 12 jurors who finally served on the jury admitted on voir dire that they thought petitioner was guilty.

And there is no comparison of the facts in *Irvin, supra*, to the facts surrounding the selection of the jury in the Sheppard case. None of the pre-trial newspaper articles in the instant case contain any releases from the prose-

cuting authorities that the petitioner confessed. In fact, the petitioner garnered a great deal of publicity before the trial, minimizing any part he may have had in the commission of the murder. Time and again statements were made by the petitioner to the newspapers or on his behalf, declaring him innocent in the clearest and most positive terms.

Omitted from the selection by the District Court of pre-trial newspaper publicity, is the amount of publicity put out by the defense prior to the trial. Innumerable stories appeared emanating from the petitioner, his counsel, his relatives and his friends, minimizing any claim that the petitioner may have committed the murder. Ignored by the District Court in selecting certain newspaper articles upon which to reverse this conviction, were numerous articles that were favorable to the petitioner, published both before and during the trial, such as the following:

The headline on the front page story in the Cleveland News of July 9, 1954, by Severino P. Severino, News Staff Writer, who, as he states, was granted permission to question Dr. Sam in the presence of his father, Dr. Richard A. Sheppard, and his attorneys, William J. Corrigan and Arthur Petersilge. The headline in large type reads:

"EXCLUSIVE! 'I LOVED MY WIFE—SHE LOVED ME,' SHEPPARD TELLS NEWS REPORTER."

Nor did the District Judge list the headline in the Cleveland Press of August 18, 1954, reading: "DR. SAM WRITES HIS OWN STORY." Under the headline appeared the text of a statement by Dr. Samuel H. Sheppard, furnished the Press by a member of his family, and above the headline is an enlarged photograph of the last paragraph of the statement, followed by the signature of the defendant, and reading:

"I AM NOT GUILTY OF THE MURDER OF MY WIFE, MARILYN, HOW COULD I, WHO HAVE BEEN TRAINED TO HELP PEOPLE AND DEVOTED MY LIFE TO SAVING LIFE, COMMIT SUCH A TERRIBLE AND REVOLTING CRIME?"

Nor does the District Judge list the headlines of the statements issued by Attorneys William J. Corrigan and Fred W. Garmone, such as the one appearing in the Cleveland Press of August 27, 1954, reading:

"SHEPPARD LAWYERS HIT STORIES ON MURDER."

followed by the text of the long statement so issued.

The District Judge also might have included other headlines as follows:

July 8, 1954, The Cleveland Press:
"DR. SHEPPARD'S STATEMENT ISSUED TO ANSWER GOSSIP."

July 8, 1954, The Cleveland Plain Dealer:
"BAY DOCTOR TALKS TO REPORTER"

July 8, 1954, The Cleveland Press:
"HUSBAND PUTS $10,000 UP FOR SLAYER"

July 9, 1954, The Cleveland Plain Dealer:
"TEXT OF DOCTOR'S STATEMENT ON HIS OFFER OF REWARD"

July 9, 1954, The Cleveland Plain Dealer:
"DOCTOR WILL HELP IN HUNT FOR DEATH WEAPON TODAY"

July 10, 1954, The Cleveland News:
"HONORED ATHLETE AT HEIGHTS HIGH"

July 12, 1954, The Cleveland Press:
"DR. SHEPPARD RETURNS TO BAY VIEW HOSPITAL TO TREAT HIS PATIENTS"

July 15, 1954, The Cleveland News:
"DRUNK, 'CONFESSES' BUT STORY FIZZLES"

July 17, 1954, The Cleveland Press:
"DR. SHEPPARD TELLS PRESS 'KILLER WILL BE CAUGHT.'"
(Then follows responses to 11 questions.)

July 31, 1954, The Cleveland Press:
"TEXT OF STATEMENT BY CORRIGAN AFTER ARREST OF CLIENT, DR. SAM"

July 31, 1954, The Cleveland News:
"POLICE CORDIAL, POLITE AS THEY TAKE SHEPPARD"

August 13, 1954, The Cleveland Plain Dealer:
"FAMILY POINTS TO BAY MAN AS NEW SUSPECT AS HOVERSTEN TALKS"

August 19, 1954, The Cleveland Press:
"DR. SAM IS ANXIOUS TO TAKE STAND, HIS BROTHER SAYS"

September 14, 1954, The Cleveland News:
"BATTLES PROWLER IN BAY. CORRIGAN LINKS BOY'S STORY WITH SHEPPARD CASE"

September 17, 1954, The Cleveland News:
"DR. STEVE HITS 'RED HERRING' ACCUSATION"

October 19, 1954, The Cleveland Press:
"WRITER FINDS DR. SAM'S LOOKS BIG ASSET FOR ACTOR CORRIGAN"

October 21, 1954, The Cleveland Press:
"DR. SAM JUST LIKE A BROTHER, 2 SISTERS-IN-LAW SAY AT TRIAL"

October 22, 1954, The Cleveland Plain Dealer:
"CORRIGAN RATED SECOND DARROW"

October 25, 1954, The Cleveland Plain Dealer:
"OTHER SIDE OF CORRIGAN LIES IN POETRY"
(With picture of W. J. Corrigan and his writer daughter)

October 26, 1954, The Cleveland Plain Dealer:
"COURT PSYCHOLOGISTS SEE TRIAL CROWD AS NORMALLY CURIOUS"

October 26, 1954, The Cleveland Press:
"SAM, WOMAN JUROR SOB IN COURT"

October 27, 1954, The Cleveland Press:
"CITY CHEMIST AIDS DEFENSE OF DR. SAM"

October 28, 1954, The Cleveland Press:
"JUROR OUT, ADMITS SHE WAS FOR SAM"

November 4, 1954, The Cleveland News:
"LETTERS WRITTEN IN JAIL BARE SHEPPARD FEELINGS"

November 5, 1954, The Cleveland Press:
"DR. SAM SAYS AUTOPSY BUNGLED"

November 9, 1954, The Cleveland Plain Dealer:
"CORRIGAN MUSES ON TRIAL'S DRAMA"

November 10, 1954, The Cleveland Press:
"GARMONE QUIZZING WILTS MAYOR HOUK"

November 11, 1954, The Cleveland News:
"HOUKS HELP DR. SAM AS MUCH AS THEY HURT"

November 11, 1954, The Cleveland News:
"DEATH HOME OPENED TO DR. SAM'S KIN"

November 13, 1954, The Cleveland News:
"CORRIGAN'S STRATEGY SCORES"

November 15, 1954, The Cleveland News:
"CORRIGAN HAMMERS AT DRENKHAN"

November 16, 1954, The Cleveland News:
"CORONER IS VILLAIN OF CORRIGAN PIECE"

November 17, 1954, The Cleveland News:
"DR. STEVE HITS PRINT THEORY; SAYS BLOOD FLOWED INTO FOLD"

November 17, 1954, The Cleveland Press:
"DR. SAM WRITES TO HIS SON"
(Photo of Letter)

November 18, 1954, The Cleveland News:
"DR. SAM DISPLAYS NO-WEAPON THEORY"
(With picture demonstration)

November 19, 1954, The Cleveland Plain Dealer:
"DR. STEVE'S TIP IS EX-PATIENT"

November 19, 1954, The Cleveland News:
"ORDERED HOVERSTEN OUT, DR. STEVE SAYS"

November 19, 1954, The Cleveland Press:
"SEEK STEVE'S 'SUSPECT' IN DETROIT"

November 20, 1954, The Cleveland Press:
"SHOTTKE AIDED SAM: DR. STEVE"

November 22, 1954, The Cleveland Plain Dealer:
"PROBE NEW BAY TIP; DETROIT MAN CLEAR"

November 22, 1954, The Cleveland News:
"SLAYING 'SUSPECT' IS WRITTEN OFF"

December 2, 1954, The Cleveland News:
"EVIDENCE CHANGED: DR. STEVE"

December 4, 1954, The Cleveland News:
"CHIP PAYS CALL ON STORE SANTA"

December 7, 1954, The Cleveland News:
"DR. SAM THANKS REPORTER"

It is not a fact that the petitioner was forced to testify at the inquest (Pet. Br. p. 29). The record shows that the

petitioner testified voluntarily (Tr. 6331). The record also shows the reason for searching the petitioner at the inquest. The police had information that the petitioner was carrying a gun after the funeral of his wife (Tr. 6803).

The petitioner had not been charged with any crime at the time of the inquest, but had been claiming up to that time that he had not done anything to cause the death of the victim. The inquest was therefore held to find out if anyone had any information as to the manner in which and the means by which the victim had been killed, or any information as to the circumstances involving the violent death.

Sec. 313.17 of the Revised Code of Ohio provides that "The coroner may issue subpoenas for such witnesses as are necessary, * * * and proceed to inquire how the deceased came to his death, whether by violence to self or from any other persons, by whom, whether as principals or accessories before or after the fact, and all circumstances relating thereto."

Ignored entirely is the testimony of Dr. Gerber that he had made arrangements for the inquest and had actually issued subpoenas before the Press editorial appeared, and that the reason it was held in Bay Village was that most of the witnesses lived there and it would be convenient.

Untold is the fact that the hearing at the inquest was in perfect order during the testimony of the petitioner, his parents, his brothers, the doctors, Don Ahern and Nancy Ahern, Mayor and Mrs. Houk and the Bay Village officers. There was no disorder until the last few minutes of the last day of the public hearing when Dorothy Sheppard was recalled to testify further. It was brought about by Mr. Corrigan, counsel for petitioner, who sought to direct the reporter to insert certain matters into the record. Mr. Corrigan was told not to do so and was cautioned that if he

persisted, he would be asked to leave. He not only persisted, but ordered the reporter to make the insertions in the record, refused to desist when so requested, refused to sit down when so requested and challenged the authority of the Coroner to put him out. The Coroner had no alternative and was obliged to have Mr. Corrigan removed from the hearing room.

This occurred within a few minutes before the close of the hearing. Furthermore, the inquest was held on July 22d, 23d and 26th and there was at that time no indictment against the petitioner. The disturbance at the inquest which Mr. Corrigan created has no possible bearing on the trial of this case, nor did it prevent the petitioner from having a fair and impartial jury.

On the claim that publication of the names of the veniremen in advance of the trial prejudiced the petitioner, there is no showing that the veniremen were approached by any agents for the state or on its behalf prior to trial, or by anyone else for that matter.

And of a certainty, there is no proof in the record, nor was any affirmative proof presented to the District Court by the petitioner, no "demonstrable reality," that the jury selected in this case was not a fair and impartial jury, or that the publicity before trial influenced the jurors who were finally selected by both sides on the two-week searching voir dire examination. The District Court's finding to the contrary is merely a matter of speculation, with no basis in fact.

B. Publicity During Trial.

The District Judge should have become acquainted with the facts as reflected in the record, showing who was largely responsible for the publicity during trial. Certainly, there is no evidence that either the trial judge or the

prosecution were trying the case in the newspapers. Dr. Steve Sheppard, petitioner's brother and a prospective witness, so persisted in trying to have the petitioner's case tried in the newspapers that the trial court was required to admonish him that if he did not desist, he, being a witness, would be excluded from the courtroom (Tr. 3722). This all took place in the Court's chambers just before the Considine broadcast was brought to the attention of the court, and the Court said:

> "Let it be now understood that if Dr. Steve Sheppard wishes to use the newspapers to try his case while we are trying it here, he will be barred from remaining in the court room during the progress of the trial if he is to be a witness in the case." (Tr. 3722.)

The petitioner's brother was making uncomplimentary remarks to the news media about the testimony of the State's witnesses (Tr. 3722).

During the trial most of the publicity was given out by the defense. Petitioner had a former newspaperman as one of his counsel, and as a former newspaper man, defense counsel knew very well how to get favorable stories in the public press. He held press conferences daily, and frequently more than once each day; and, with his client, posed for hundreds of pictures which, together with favorable personal stories, appeared in all types of news media. The amount of publicity so put out by the defense was enormous, and far outshadowed any attention given the State. Defense counsel found that by continually denouncing the newspapers and public officials, he could get an even greater amount of publicity. Mr. Corrigan's skill in the art of publicity is demonstrated by the innumerable stories that appeared, emanating from the petitioner, his counsel, his relatives and his friends. The bales of newspapers offered by the defense in support of their motions

for a change of venue show these favorable personal stories and the innumerable photographs for which the petitioner and his counsel posed.

That the objection made for the record to the taking of photographs was without justification and mere pretense is proved by the testimony of Julian Wilson during the hearing on the motion for new trial. Mr. Wilson was a photographer for the Associated Press, assigned to this trial, and testified on the motion for new trial that he made many pictures of Dr. Sam Sheppard and considerably over a hundred of Mr. Corrigan (Tr. 7088). His testimony speaks for itself:

"Q. Now, did you take any pictures in this Court room while the court was in session?

A. No, sir, I did not.

Q. Now, while the court was not in session, during recess or after adjournment, did you take pictures in this Court room and around this building?

A. Many times.

Q. Did you take pictures of Mr. Corrigan?

A. Yes, sir.

Q. About how many times?

A. Roughly—it would run considerably over a hundred negatives.

Q. About a hundred negatives. And of Dr. Sam Sheppard?

A. I made many pictures of him.

Q. And Mr. Garmone?

A. He, too, I have made many pictures of.

Q. Now, did Mr. Corrigan ever object to your taking any of these pictures?

A. A few times he has objected.

Q. When was that?

A. About the middle of the trial or towards the end of it, Mr. Corrigan—we were instructed that Mr. Corrigan didn't want any pictures made of himself, the defense, or the defendant.

Q. How many pictures had you taken without his objection before you received those instructions?

A. Oh, many.

Q. More than 50?

A. I'd think so.

Q. And after you received the instructions, did you stop taking pictures?

A. Yes, sir.

Q. And how long did that continue?

A. About a week and a half, two weeks.

Q. Then what occurred?

A. We asked Mr. Corrigan's permission.

Q. And did you get it?

A. Yes, sir.

Q. And then resumed taking pictures?

A. Yes.

Q. How many pictures did you resume taking—did you take after you resumed taking those pictures?

A. I'd say not as many as before because we didn't need as many pictures.

Q. More than 20 or 25?

A. About that.

Q. Now, with respect to the defendant, Dr. Sam Sheppard, is the number of pictures that you took before the objection by Mr. Corrigan about the same as what you took of Mr. Corrigan?

A. About, yes.

Q. You took about 50 before. Then there was this period when you didn't take any pictures because of the objection, is that correct?

A. That's true, sir.

Q. And then did you later resume?

A. Yes, sir.

Q. With whose permission?

A. Well, when we got Mr. Corrigan's permission, we resumed taking pictures.

Q. And about how many did you take after you got permission?

A. Somewhere around 15, 20, 25.

* * *

Q. Did you ever take a picture of either Dr. Sam Sheppard or any of his counsel over their objection?

A. No, sir.

* * *

The Court: May I have just one question? Were you present at the conference which the Court had with photographers prior to the opening of the case?

The Witness: Yes, sir, I was.

The Court: And at which the Court stated what the rule would be as to taking pictures during the trial?

The Witness: I was.

The Court: Do you recall what that was as to taking pictures within the court room and of the defendant and his counsel?

The Witness: Yes, I do recall.

The Court: All right. State it.

The Witness: Your ruling, sir, was that no pictures would be made at any time when the court was in session, and you also requested that we make no pictures of the defendant or the defense or anyone without their permission. I believe that is the gist of the thing.

The Court: That's correct." (Tr. 7087-7091.)

It is obvious from the record that objections by the defense to the newspaper publicity were quite pro forma and mere pretense.

On the voir dire, at the outset, the court instructed the prospective jury that the defendant was presumed to be innocent unless and until he was found by a jury to be guilty of the crime beyond a reasonable doubt and that finding was to come, not from anyone's notions or outside information, but must come on the basis of testimony heard from the witness stand (Tr. 31). The prospective jury were further instructed that they were not to discuss this case or any feature of it with anyone; that they were

not permitted to have anyone speak to them about it; that they were not to remain anywhere where other people were speaking of it among themselves; and that they were not to speak of it among themselves (Tr. 35). The prospective jury were also questioned concerning newspaper articles and radio broadcasts and whether they would be influenced or swayed by anything anybody said outside of the court room (Tr. 167-168, 214).

The prospective jury were also questioned as to whether they would consider the question of the guilt or innocence of the defendant solely on the basis of the evidence that was received in the courtroom from the witness stand (Tr. 236). And they were further questioned as to whether they would follow the instructions of the court not to read anything about the case in any of the newspapers and not to listen to any discussion of the case on the radio or television (Tr. 279).

The court said to the jury at Record 1452:

> "A fair and an impartial juror is a juror who can sit here patiently and who can listen to all of the evidence that is produced in a case and to the instructions of the court as to the law applicable to the particular case, and who can honestly close out the rest of the world for the moment and bring a curtain down on all information he may have about the matter from other sources, and be guided entirely by the evidence and the instructions of the court as to the law applicable to the particular case" (Tr. 1452).

And when the jury was impaneled, the court instructed the jury not to talk about the case to anyone; not to permit anyone to talk to them about it; not to remain anywhere where other people were talking about it themselves, in the jury room or elsewhere; that it was each one's duty as an individual juror and responsible citizen to keep his own counsel, to listen to the evidence that came

from the witness stand and the instructions of the court as to the law, and wait until all those are complete before they formed any opinion or judgment whatever as to the outcome of the case, which opinions and judgments were to be expressed only in the jury room after the case was finally submitted to them for deliberation and decision. The jury were further told by the court that during the pendency of the trial, they were not to listen to comments about it over the radio or otherwise and not to read the newspapers (Tr. 1591). The court said: "You will get here the only facts that you are to consider in the determination of this case" (Tr. 1592).

Each juror had agreed that he or she would disregard everything other than the evidence received in open court and would, in conformity with the instructions of the court, render a fair and impartial verdict. The jurors took the oath required by law and there is not a shred of evidence in the record, nor was there any affirmative proof before the District Court that each and every juror did not fully and completely abide by the oath so taken.

There is not a particle of evidence in the record or before the District Court to show that the jury was in any way influenced by reports or stories in the newspapers or over the radio, or anything else, or that the jury or any juror was biased or prejudiced by any such stories or broadcasts.

Although several jurors were subpoenaed and were interrogated by defense counsel on the hearing on the motion for new trial, not a word of testimony was produced to justify the claim that the jurors were influenced by anything other than the evidence produced in open court in reaching their verdict. The District Court's finding that publicity during the trial prejudiced the petitioner is based upon mere speculation and suspicion, with no basis

in fact. Certainly, it is not supported by the record. A fair and objective analysis of stories to the public will disclose that they made no effort to slant the stories, certainly not to influence the jury in arriving at their verdict. Nor is there any proof whatsoever offered by the petitioner that the jury was influenced by anything other than the evidence produced in court in reaching its verdict.

The District Court held that the trial judge committed error when he failed to question the jury regarding the Robert Considine broadcast. This incident was before this Court for consideration in the former petition. Urged for the first time in the Supreme Court of Ohio by the defense, as error, was the refusal of the trial court on motion for continuance in the 5th week of trial to ask the jurors if they heard a broadcast by Bob Considine over Station WHK in which there was something said about the Sheppard case. This matter was brought up in the court's chambers and neither the court nor the prosecutors had any knowledge whatsoever of the alleged broadcast. Mr. Corrigan, counsel for the petitioner, complained that Bob Considine had paralleled a denial of the petitioner as set forth by Officer Schottke with a denial of Alger Hiss when he was confronted by Whittaker Chambers, without stating that Dr. Sheppard was in bed in the hospital at the time of his denial, while Mr. Hiss was strong, mentally and physically.

Apart from this assertion of counsel, no proof whatever was submitted to the court as to the exact nature of the broadcast, although Mr. Considine was available, it being conceded by the defense that he was in daily attendance at the trial. When the court stated: "We are not going to harass the jury every morning," Mr. Corrigan then responded, "I can't help it, Judge. If you don't that's all right with me. I make my exception." (Tr. 3725.)

That it was not error for the court to refuse to interrogate or poll the jurors during the trial as to whether they had read a newspaper article or heard a radio broadcast such as the Considine broadcast, is affirmed by the annotation in 15 *A. L. R.* (2) 1152, wherein it is stated:

> "The present annotation is concerned with the question of whether, during a criminal trial, the jurors may be interrogated or polled as to whether they have read newspaper articles pertaining to the alleged crime or the trial. As the title indicates, the annotation involves the propriety of interrogation or polling after impanelment, as distinguished from that which occurs on voir dire examination.
>
> "The few cases that involve this specific point all uphold the trial court where it refuses to interrogate, or refuses to let a party interrogate, the jurors as to the reading of newspaper articles relating to the trial or the crime. The decisions generally turn on the fact that the trial court had instructed the jury not to read the articles or that there had been no showing by the moving party that the jurors had in fact read them."

Whatever the news media, whether it be newspapers or radio broadcasts, the same principle should apply. As stated in *Trombley v. Langlois* (R. I.), 163 A. 2d 25 (1960):

> "An impartial trial is one in which jurors reach a verdict upon a consideration of only those matters that were introduced in evidence during the trial and matters not so introduced, should not be brought to their attention through an interrogation of the jury to determine whether they have knowledge of allegedly prejudicial material published in the newspapers."

In *State v. Hilliard*, 89 Arizona 129, 359 P. 2d 66 (1961), it was held that the granting of the defendant's request for interrogation of jurors during trial as to whether they had read newspaper accounts, rested in the

sound discretion of the trial court and refusal to permit poll was not error.

It was held in *Ford v. U. S.*, 233 F. 2d 56 (C. A. 5th Tex.) (1956) that it is within the discretion of the trial court, whether after impanelment during criminal trial, the jurors may be interrogated as to whether they had read newspaper articles. Refusal of trial judge to permit interrogation of jury regarding article was not error, where court instructed jury at beginning of trial not to read "any stories in the newspapers about the case."

The District Court comments that during the trial there was a broadcast by Walter Winchell in which he related the story of a woman in New York who claimed she had been a mistress of Sam Sheppard (R. p. 450a). This incident was referred to in the previous petition. At the request of defense counsel, the court inquired of the jurors whether they had heard the Winchell broadcast and two jurors responded that they had. The jurors had no knowledge that Mr. Winchell was to broadcast anything at all pertaining to the Sheppard case or to Sam Sheppard. The two jurors who heard the broadcast were asked by the Court: "Would that have any effect on your judgment?" Both answered, "No." The Court stated:

> "Have any of you, other than these two ladies, heard anything about that broadcast last night? And I wish to ask you two ladies in particular, and all of you in general, to pay no attention whatever to that kind of scavenging. It has no place, in my judgment, on the air at all, but that is not for me to determine, but surely it has no place whatever in our thinking or considerations or thoughts in any way, shape or manner in this case. Let's confine ourselves to this court room, if you please." (Tr. 5429-5430.)

Upon the hearing on the motion for new trial and even though several of the jurors had been subpoenaed, the de-

fense, though afforded an opportunity to interrogate the jurors, produced not a word of testimony to support their claim that the jurors heard the Considine broadcast. There is in the record no proof that any of the jurors were influenced by this broadcast or the so-called Winchell broadcast, or by anything else other than the evidence produced in open court.

The Court of Appeals stated:

"The presumption that obedient to instructions, the jurors ignored publicity during the trial has not been overcome by petitioner. The only showing that any of them encountered any of this publicity came when the trial judge questioned the jurors about a Winchell broadcast during the trial attributing marital infidelity to Dr. Sheppard. Two jurors advised that they had heard the broadcast, but would not be influenced by it, and an appropriate admonition on the subject was given by the judge. Defense counsel also requested interrogation of the jury as to their knowledge of another broadcast in which one Considine made remarks derogatory to Dr. Sheppard. The trial judge refused this request, observing that he did not think the jury should be harassed with interrogation each morning. We believe that this action was itself within the discretion of the judge, and that it may indeed have been the best thing to do. A discreet judge might well conclude that repetitive reference and inquiry as to matters prejudicial to the defense would harm rather than help. A substantial number of lawyers skilled in the art of advocacy would, we think, agree. Compare *Estes v. United States,* 335 F. (2) 609, 615 (CA 5, 1964), *cert. denied,* 379 U. S. 964 (1965); *United States v. Provenzano,* 334 F. (2) 678, 696 (CA 3, 1964), *cert. denied,* 379 U. S. 947 (1964); *Ford v. United States,* 233 F. (2) 56, 61-62 (CA 5, 1956), *cert. denied,* 352 U. S. 833, 1 L. Ed. (2) 53 (1956). In any event, any effect that this limita-

> tion of interrogation during trial might be thought to have is dissipated by the opportunity accorded defense counsel to interrogate jurors on their motion for a new trial. Three of the jurors were thus questioned, but counsel did not see fit to inquire into possible contact with trial publicity." (Pet. App. A, pp. s.29-s.30.)

Reference is made to publicity of the family of Juror Lois Mancini. This incident was considered by this Court in the former petition. Furthermore, Lois Mancini was not present during the visit of the reporter and did not participate in the interview. We wish to also note that she was merely an alternate juror and did not participate in the deliberations or the verdict.

It is claimed that the trial court had a duty sua sponte to sequester the jurors. There is no requirement under the laws of the State of Ohio that a jury be sequestered during the trial. In fact, the Ohio statute makes it a matter of discretion on the part of the trial court. Section 2945.31 of the Revised Code of Ohio provides:

> "After the trial has commenced, before or after the jury is sworn, the court may order the jurors to be kept in charge of proper officers, or they may be permitted to separate during the trial. If the jurors are kept in charge of officers of the court, proper arrangements shall be made for their care, maintenance, and comfort, under the orders and direction of the court. In case of necessity the court may permit temporary separation of the jurors."

With the trial lasting over two months, there is no showing that the trial court abused its discretion, nor was there any request by the defense that the jury be sequestered during the trial. To keep the jurors from their families for that length of time would have imposed an unnecessary hardship upon the jurors. Further, the fact is that there is no affirmative evidence, nor did the petitioner offer any proof,

and the District Court points to none, that any juror read any of the alleged prejudicial newspaper publicity during the trial, contrary to the instructions of the trial court.

No claim was made by the defense in the state courts or on certiorari that the trial court abused its discretion in not sequestering the jury during the lengthy trial. Again, whether a jury should be sequestered is a matter of state legislation giving the trial court discretion.

Defense counsel in the instant case could have objected to any sequestration of the jury. The Court of Appeals pointed out:

> "* * * We cannot speculate now whether able defense counsel would have welcomed such a procedure, or whether long insulation and confinement of a jury trying a first degree murder case might be thought more likely to lead to conviction and a death penalty than permitting the jury the relaxation and refreshment of living at home, even with the possible exposure to extracurial publicity." (Pet. App. s.9.)

The Trial Court stated on the hearing on the motion for new trial:

> "While this Court would not for the world minimize the importance of guarding this jury—or the jury in any other case—from annoyance or influence, he must express the thought that human beings, whether serving as jurors or not, cannot be wrapped in cellophane and deposited in a cooler during trial and deliberation.
>
> "The jury in the instant case was jealously guarded throughout the entire proceedings and it is worthy of note—and indeed decisive in this Court's judgment, that not a suggestion of influence upon the jury is forthcoming from any person or agency. Interference or influence must be the test. If we are to convict jurors without a scintilla of evidence of undue influence on them, it is now pertinent to halt and

ask ourselves what becomes of our faith in our decent fellow-citizens and of what value is the jury system at all.

"It is claimed that the jurors were permitted to separate on one or two occasions within the period of their deliberations and were so photographed. Foreman Bird and Bailiff Francis testified that the so-called separation of jurors was merely their momentary division in the dining room of the hotel for the purpose of photographing the men in one group and the women in the other. It was in the presence of the two bailiffs, was only a few feet in extent and there was no communication of any kind with the jury by the photographer. To term such a petty detail a 'separation' is stretching the imagination to a dangerous point. It certainly is not the separation prohibited by law and is hardly worthy of serious thought or comment.

"The Court had complete confidence in the jury in this case; it was protected at all times from any possible approach, and its every movement and conduct would seem to be an eloquent demonstration of the fact that it proved itself worthy of the confidence placed in it to faithfully carry out the admittedly tremendous responsibilities entrusted to it." (R. pp. 44a-45a.)

The District Court claims that special note must be given to the attempt of the newspapers to influence the jury by taking photographs of the jury so that they would look for their photographs in the newspaper and thereby expose themselves to the prejudicial reporting (R. p. 453a). On the motion for new trial, the trial court stated:

"Jurors were flash-photographed in their comings and goings and it is difficult to know how that can be prevented even if, indeed, it should be. Jurors are human beings and become citizens of special importance when undertaking a signal public service. Not a single

complaint was registered by any juror in this connection and it is worthy of note that the defense does not even claim that any juror was affected in the least by it. Furthermore, they were not flashed by agents of the State nor on its behalf. Such exposures to public attention are not matters of prejudice for or against either the State or defendant but matters of news interest to newspapers. They remain wholly neutral if fed sufficient news or pictures of interest." (R. pp. 40a-41a.)

No pictures were taken of the jury during their deliberations in the jury room, nor is there any evidence that this jury was approached by the news media about the evidence in the case.

On the trial, the trial judge said:

"The court will state that; that at the outset of this trial the court ordered that no pictures be taken of the jurors while the impaneling was in progress, and absolutely refused to permit any pictures to be taken of the jurors in their seats during the impaneling and during the proceedings that resulted from the impaneling, and that the court had stated to the photographers and other newspaper representatives that if and when a jury was finally seated, that they would be permitted, outside of the court sessions, to have a picture of the jury, if all jurors were agreeable to that procedure." (Tr. 1635.)

The District Court comments that the newspaper ran editorials praising the trial judge and that he was a candidate for re-election; that this certainly was an attempt to bring him around to their way of thinking. (R. p. 453a.) And counsel for the petitioner infers in his argument to this Court, that if the trial judge had not been running for re-election to retain his post, and the prosecutor had not sought election to the bench, the petitioner would not have been convicted of this crime.

The state judge was not the trier of the facts in this case. The verdict on the facts was rendered by a jury. Nor is there any showing that the trial judge or the prosecutor were, as a result of running for election, denying due process to the petitioner. The Court of Appeals appropriately said:

> "Much has been made of the fact that the Sheppard trial begun on the eve of a judicial election at which the trial judge and one of the prosecution staff were candidates. We must assume that this is emphasized to imply that desire for victory may have led the jury to conduct prejudicial to Dr. Sheppard's rights. We would have to entertain a low estimate of the integrity of our fellow judicial officers to join in any such inference. In most of the states of the Union it is traditional that those who occupy judicial office be required from time to time to account for their stewardship by submitting to election. If it is suggested that we presume that an elective judiciary can preserve constitutional rights only at some undefined distance in time from election day, we reject such suggestion out of hand. As realists we know that those who seek reelection to judicial office hope that their conduct will find public approval, but we do not think that judicial *misconduct* would be more attractive to the electorate than conduct marked by the integrity which we as judges like to believe is possessed by elected judges as well as those who have the security of tenure during 'good behavior.' Nor are we prepared to presume that any judge is so far enamored of his position as to betray its responsibilities, no matter what he thinks would most please the electorate. Additionally, it is not inappropriate to note that much of the publicity complained of, and the actual taking of testimony at Dr. Sheppard's trial, occurred *after* the election had been held. For like reasons, we must reject Dr. Sheppard's repetition in this Court of his broadside charge 'that the elective

judges of Ohio were so biased and prejudiced against him that he could not expect fair adjudication of his case in state courts. * * *' " (Pet. App. A, pp. s.41-s.43.)

The District Court claimed that the requisite atmosphere for a fair trial did not exist. Counsel for the petitioner has submitted a wholly distorted picture of the arrangements made by the trial court before trial to govern the news media. For a fair and objective statement pertaining to such arrangements, we direct the attention of this Court to the words of the trial judge in his memorandum on the motion for new trial.

Regardless of what action was taken by the trial court, it was certain that all of these newspaper reporters were to be present and that demands would inevitably be made upon the trial court by all types of news media. When the affidavit in support of a motion for new trial (App. A, pp. s.158-s.164) was filed with the trial court, the trial Judge stated, in ruling upon the motion for new trial:

"Realizing that the case had caught the public imagination to an extent leading national and, indeed, international news media to decide to fully 'cover' the trial, and having requests for space for many of them, the Court decided to make proper arrangements before trial and to control the situation so as to minimize and, if possible, eliminate confusion during the trial. The court room is small.

"The Court assigned specific seats to individual correspondents in the rear of the court room and back of the trial area, and issued orders that there was to be no crowding or congregating at the front end entrances (one on each side of the bench) of the court room; that there was to be no passing back and forth through the trial area and that all entries to and moving out of the court room be via the public doorway in the rear of the court room. Mem-

bers of the defendant's family were accommodated with seats at all times during the trial. The same was accorded members of the family of the murdered Marilyn. Members of the general public were admitted to the extent of the seating capacity of the court room and a scheme of rotation was established so that many persons attended some sessions of the trial and no favored members of the general public were present at all times, nor permitted to be.

"Rules were prescribed for photographers and representatives of radio and television stations. They were cautioned that no cameras were to be permitted in the court room excepting in the morning before the convening of court and at the close of the day after adjournment, and that in no event were pictures of the defendant to be taken in the court room at any time excepting with his consent or that of his counsel.

"The Court's arrangements and orders were carried out with one or two simple insignificant exceptions, due to over-enthusiasm. The defendant and his chief counsel were far more gracious to the press, photographers and gallery than was the Court. A very large number of pictures of the defendant, his family, counsel and friends were taken in the court room (outside of court session periods) with their permission and without complaint. Counsel for the defense held press conferences in the court room with cameras clicking; all to the apparent delight of counsel for the defense, and, naturally, without protest.

"Julian Wilson, a photographer for the Associated Press, testified on this point at the hearing had on the motion and supplemental motion. His testimony stands wholly unchallenged and it states the procedure followed with perfect clarity.

"* * *

"Some space outside of the court room which could be spared for the moment without interference

with the public service was used by publicity agencies for their typewriters and other equipment but it is definitely not true, as stated in the motion herein, that:

'The Assignment Room, where cases are assigned for other causes to court rooms, was assigned by the Court to reporters and telegraphers.'

"Some generally unused space in the Assignment Room was so assigned. Neither person, record, nor piece of equipment in the Assignment Room was moved, removed or displaced and the Assignment Room functioned normally throughout the entire period of the trial of this cause. One of the real purposes of assigning that space to the uses mentioned was to remove them entirely from the immediate court room area. They were out of the corridors leading to the court room and permitted free movement of the public and visitors within the building, whether there in connection with this case or otherwise, wholly unaffected by the Assignment Room space activity." (R. pp. 39a-41a.)

The Ohio Court of Appeals in its opinion, stated:

"It is claimed also that the court arranged the courtroom to accommodate a great many representatives of the press, radio and television and other news-disseminating agencies, thus restricting accommodations available for others. The record shows that the defendant's family was provided for and that the defendant's brother Dr. Stephen Sheppard, although a witness, was permitted by order of the court to remain in the courtroom throughout the trial. The court in this case was presented with a very difficult matter because of the unusual amount of coverage attempted by the press, radio and television agencies. The arrangements made by the court were within its sound discretion. Certainly the defendant was afforded a public trial, and from a reading of the record, we cannot say that the court in seeking to main-

tain an orderly proceeding abused its discretion in directing the courtroom arrangements." (R. p. 84a.)

The Court of Appeals said:

"The District Judge also concluded that news coverage of the trial deprived petitioner of his constitutional rights because it contributed to a 'carnival atmosphere.' Stress is laid on the manner in which the trial judge allocated the seating available in his small courtroom, giving most of it to the press and installing special tables for them. Now, with the reflection and the hindsight that an interval of ten years has provided, and after all of the appellate tribunals have found the judge's conduct in this regard without constitutional fault, it is asserted that the trial judge should have done a better job. We are not told what alternative measures he should have adopted. Certainly he was without power to slake the public interest. Should he then have selected news representatives who would be regularly favored with admission to the courtroom, and let each day's trial begin with a scramble by the unfavored to gain access? Should he have moved the trial out of the courtroom into some public hall or auditorium where the public and the press could be accommodated at a greater distance from the jury and counsel? Shall we now speculate whether such planning would have reduced or augmented the so-called 'carnival atmosphere'? It is asserted also that too many photographs were taken of the jury, the defendant, and counsel. No photographs were allowed to be taken in the courtroom while the court was in session. In view of today's increasing dissatisfaction with the aggressive performance of many of the news media, it may indeed be regretted that the trial judge did not enforce more rigid discipline of its representatives. But we can no more find impropriety of constitutional magnitude in what occurred than could the other appellate courts that have been challenged to do so.

"The claim that the trial judge contributed to a 'carnival atmosphere' is further supported by emphasis on the installation in the courtroom of a microphone and loudspeakers. This is surprising in view of the fact that it has become regular practice to install such electronic equipment in modern courtrooms, including those occupied by the United States District Courts. We find no merit in this claim." (Pet. App. A, pp. s.30-s.31.)

The Court of Appeals said further:

"The opinion of the District Court additionally criticizes activities of the press as follows:

'The Court need not be naive, and it does not stretch its imagination to recognize that one of the purposes of photographing the jurors so often was to be assured that they would look for their photographs in the newspapers and thereby expose themselves to the prejudicial reporting. Also, the newspapers ran editorials praising the trial judge (he was a candidate for re-election) and published photographs and sketches of him in at least 46 separate issues. *This was certainly an attempt to bring him around to their way of thinking.*' 231 F. Supp. 63. (Emphasis supplied.)

"Even if we were to join in the apparently gratuitous inference as to the press' motives, we have just examined the reasons why we cannot join in the presumption that the jurors violated their oaths and instructions by examining the trial publicity. Nor are we willing to assume the judicial venality or timidity we would have to assume to find any effect of such publicity on the judge in the face of a record which is entirely devoid of any evidence of trial misconduct on his part." (Pet. App. A, pp. s.31-s.32.)

Much is made of "disruption of the trial by newsmen." It is claimed that the newsmen were responsible for noise and laughter in the courtroom, but in the petitioner's brief

it is shown from the record that the noise was in the hall, not in the courtroom. (Pet. Br. p. 41.) And the fact that there were many newsmen at the trial does not in and of itself establish that there was any hostile atmosphere existing during the trial against the petitioner.

As to the incident of laughter (Pet. Br. p. 40), it resulted from Mr. Corrigan's remark "Well, I don't care what the conversation was" after he had asked the witness what the substance of a conversation was, and the witness had given his answer.

As to the warning by the court relative to the exhibits, the son of defense counsel was observed examining and handling the pillow-case exhibit.

It should be remembered that this trial continued for some nine weeks and that necessarily there are times when people are required, for one reason or another, to leave the court room. A few of these occurrences caused the Court to admonish the spectators to the end that there be no interruption of the trial proceedings.

The reference by the Ohio Supreme Court to the "atmosphere of a Roman holiday" merely described the widespread publicity furnished by the news media to the public at large and had no reference to the conduct of the trial itself, nor to the proceedings in the courtroom. The expression is also used to mean a "good time" or "field day." Certainly, there was no atmosphere of hostility existing against the petitioner on the trial. And it by no means follows that the news media slanted the news or even tried to do so to prejudice or to convict the petitioner. As clearly indicated by Judge Bell in his opinion, it was a case involving "murder and mystery, society, sex and suspense." The curiosity of the public, excessive though it may have been, necessarily brought about the widespread publicity.

As the majority of the Court of Appeals said:

"It should be observed here, however, that no rule of law, no procedural device, and no constitutional guarantee could then or now erase the murder of Dr. Sheppard's wife or its circumstances; such events inevitably cast the Sheppard trial into the setting so graphically described by Judge Bell. Judge Bell's accurate observation, in our view, merely demonstrates that the Ohio Supreme Court was fully aware of the subject before it. The fact that two of the Ohio judges dissented bespeaks the searching and vigor that must have attended the deliberations of the seven judges whose decision ended Ohio's appellate review of the matter now before us." (Pet. App. s.7-s.8.)

With reference to the argument that the public was barred from the trial except by special pass, the courtroom was small, and as this Court said in *Estes v. Texas,* 381 U. S. 532, 14 L. Ed. 2d 543, 584 (1965), by Mr. Justice Harlan:

"Obviously, the public trial guaranty is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats. The guaranty will already have been met, for the 'public' will be present in the form of those persons who did gain admission. Even the actual presence of the public is not guaranteed."

All we have in the instant case in the finding of the District Court that the jury was not a fair and impartial jury is suspicion, surmise, conjecture, and a general distrust of the jury with no basis in fact that the jury was not to be trusted to render a fair and impartial verdict based solely upon the evidence produced in court and the instructions of the court on the law applying to the evidence.

As the majority of the Court of Appeals said:

"Judge Blythin summed up his own estimate of the situation in the following language:

'We can't control publicity, and I do not believe that you will ever end the publicity in this case until you end the trial of this case, and I think perhaps it is our duty to put that business in reverse and proceed on a business-like, fair, honest, legal basis to try the case and have it disposed of in the interest of the State and certainly it is in the interest of Sam Sheppard to know whether a fair and impartial jury would declare him guilty or not guilty on the evidence which will be here produced. * * *'

We hold that petitioner failed to meet his burden of proving that the pretrial and trial publicity discussed above denied him due process of law or its equal protection." (Pet. App. s.33-s.34.)

II.

IMPARTIALITY OF THE TRIAL JUDGE.

The District Court made a finding that the trial judge should have disqualified himself (R. p. 456a).

This finding is based solely upon the unsworn statements of columnist Dorothy Kilgallen Kollmar to whom the trial judge allegedly said before the trial, "Well, he (Sheppard) is as guilty as hell and the case "is open and shut" (R. p. 457a); and Edward Murray, an employee in the office of the Clerk of the Common Pleas Court of Cuyahoga County, to whom the trial judge allegedly said months before the trial, "Sam Sheppard is as guilty as he (the judge) was innocent." (R. 386a.)

It is a matter of common knowledge around the Court House in Cuyahoga County that Ed Murray was a patient of the petitioner's brother, Dr. Steve Sheppard, and has a son in the same osteopathic field, who interned at the Sheppards' hospital.

It was also well known among the news reporters at the Criminal Courts Building during the trial, that Dorothy Kilgallen Kollmar was not on friendly terms with the trial judge and if anybody made a disturbance during the proceedings, she did. Judge Blythin had warned her that she would be barred from the courtroom if she did not obey his rules. She was always arriving late and rushing around to get material in a hurry for her noon lead.

A third unsworn statement was made by Mr. Garmone, one of the three trial counsel (R. p. 382a), which shows that defense counsel were satisfied that the trial judge would be fair and impartial in the handling of the trial, and that no affidavit of bias and prejudice was filed against the trial judge. While Judge Blythin's son was a member of the Cleveland Homicide Bureau, he did not participate in the investigation of this crime. The trial record shows who the investigating officers were.

We do not find that Dorothy Kilgallen's statement is a matter of record in the District Court. R. pp. 388a-392a shows her statement in which it is stated: "By agreement of counsel, no oath is administered since the integrity of the witness is not in dispute." The statement was taken on May 9, 1964 in New York, but how the District Court obtained the statement is not a matter of record. She was not cross-examined.

On the basis of this highly incompetent matter which would have no standing in any court, the District Court impugns the integrity of the state trial judge. The District Court concludes that these unsworn statements are uncontroverted evidence in this case and must be accepted as being true. (R. pp. 458a-459a.) Upon what legal basis must they be accepted as being true?

The statements do not even rise to the level of affidavits, and even if they had been made under oath, it

has been held that issues of fact cannot be established in habeas corpus proceedings by ex parte affidavits; *Walker v. Johnston*, 312 U. S. 275, 285, 85 L. Ed. 830, 61 Sup. Ct. 574 (1941); *Moses v. Hudspeth*, 129 F. 2d 279, 280 (10th Cir.) (1942), certiorari denied in 317 U. S. 665, 87 L. Ed. 534, 63 Sup. Ct. 73; *Jones v. Cunningham*, 313 F. 2d 347 (4th Cir.) (1963).

Further, the District Court knew that there is no way of rebutting these statements since the trial judge has been deceased for some years. To honor these unsworn statements is analogous to denying cross-examination. Waiting for some ten years until the State of Ohio, the plaintiff in the original action, was unable to defend by the refuting statement of an esteemed trial judge has the direct effect of denying the State of Ohio due process of law. And it is material to ask, where have these individuals been for the last ten years who are now claiming that Judge Blythin made such statements to them, if what they now say is the truth?

The District Court made no examination of the trial record to support his finding that the trial judge was biased and prejudiced, and the only proper and competent proof to determine this issue is the record of the trial which speaks for itself. Nor is there any showing in the trial record that the trial judge, in fact, did anything but properly carry out his duties as a presiding judge in this case in safeguarding and protecting the rights of this petitioner to a fair trial by a jury. Judge Blythin was not the trier of the facts. Issues of fact on the trial were determined by a jury, not by the judge.

In charging the jury, the trial judge said:

"It has undoubtedly occurred to you that deciding what the facts are in a case of this kind is a very important

function. It is, in fact, an all important function and is exclusively your function. With it I have nothing whatever to do, and if by anything that has been said or done during the progress of this trial, or by something that is now said, or by some emphasis which you may think I place on something I now say, there is expressed—there is created in your minds some impression that I have formed some opinion as to what the facts are in this case, you are now instructed to disregard and dismiss such impression entirely and to proceed to arrive at your own conclusions on the basis of instructions now being give to you. You are the sole judges of the facts in this case." (Tr. 6992-93.)

Section 2701.03 of the Revised Code of Ohio reads:

"When a judge of the Court of Common Pleas is interested in a cause or matter pending before the court, is related to, or has a bias or prejudice either for or against a party to such matter or cause or to his counsel, or is otherwise disqualified to sit in such cause or matter, on the filing of an affidavit by any party to such cause or matter, or by the counsel of any party, setting forth the fact of such interest, bias, prejudice, or disqualification, the clerk of the Court of Common Pleas shall enter the fact of such filing on the trial docket in such cause and forthwith notify the chief justice of the Supreme Court. The chief justice shall designate and assign some other judge to take the place of the judge against whom such affidavit is filed. The judge so assigned shall try such matter or cause. Such affidavit shall be filed not less than three days prior to the time set for the hearing in such matter or cause."

This state legislation requires the timely filing of an affidavit of bias and prejudice and both the state constitutional provision and state statute require that the question of bias and prejudice be determined by the Chief

Justice of the Supreme Court. No affidavit of bias and prejudice was filed in the instant case in the state court.

It is stated in 30A *American Jurisprudence,* Sec. 172, p. 89:

> "A judge is not disqualified to sit in a criminal case merely because he has an opinion as to the guilt of the accused, or is convinced of his guilt, * * *"

Furthermore, even though the trial judge may have expressed an opinion as to the guilt of the petitioner to strangers to the case, there is no showing or any proof that the trial judge conveyed any such personal opinion to the jury, who were the triers of the facts. The trial judge did not render the judgment on the facts.

The Court of Appeals said:

> "We believe that the District Judge was under a misapprehension in assuming that because Judge Blythin could not answer the charges against him, such charges constituted 'uncontroverted evidence' that Judge Blythin had made the statements attributed to him. There are many circumstances in which testimony need not be accepted even though formally uncontradicted. *E.g., Quock Ting v. United States,* 140 U. S. 417, 420-22, 35 L. Ed. 501, 502-03 (1891); *Scates v. Isthmian Lines, Inc.,* 319 F (2) 798, 799 (CA 9, 1963); *Ramos v. Matson Nav. Co.,* 316 F (2) 128, 132 (CA 9, 1963); *D'Orsay Equip. Co. v. United States Rubber Co.,* 302 F (2) 777, 779-80 (CA 1, 1962); *Powers v. Continental Cas. Co.,* 301 F (2) 386, 388-89 (CA 8, 1962); *Wooley v. Great Atl. & Pac. Tea Co.,* 281 F (2) 78, 80 (CA 3, 1960); *Hasson v. C. I. R.,* 239 F (2) 778, 782 (CA 6, 1956); *Andrew Jergens Co. v. C. I. R.,* 125 F (2) 686, 689 (CA 6, 1942); *Goodyear Tire & Rubber Co. v. FTC,* 101 F (2) 620, 624 (CA 6, 1939), *cert. denied,* 308 U. S. 557, 84 L. Ed. 468 (1939); 8 Cyclopedia of Fed. Proc. § 26.98 (3d ed. 1951); 11 Id. § 47.161 (3d ed.

1963); 7 Wigmore, *Evidence*, § 2034, pp. 260-63 (3d ed. 1940). Manifold reasons for rejecting the 'uncontroverted' statements adduced by petitioner exist in the present case. Whether offered to prove the matter asserted or merely the fact of assertion, testimony as to the uncorroborated oral statement of a deceased person is the weakest form of evidence, viewed with suspicion and subject to close scrutiny. 'The courts consider with suspicion, or lend a reluctant ear to, statements as to what a deceased person may have said, especially when corroboration is lacking.' 31A C. J. S. *Evidence*, § 266, p. 689. Such statements 'are regarded as of comparatively little probative value. * * *' 20 Am. Jur. *Evidence*, § 1196, p. 1048, and '* * * courts of justice lend a very unwilling ear to statements of what dead men had said,' *Lea v. Polk County Copper Co.*, 62 U. S. (21 How.) 493, 504, 16 L. Ed. 203, 207 (1859). * * *" (Pet. App. A, pp. s.35-s.36.)

The Court of Appeals said further:

"The only authorities cited by the District Judge for his finding of constitutional error in the failure of the trial judge to recuse himself, *State, ex rel. Pratt v. Weygandt, Chief Justice*, 164 Ohio St. 463, 132 NE (2) 191 (1956); *Tumey v. Ohio*, 273 U. S. 510, 71 L. Ed. 749 (1927); *In re Murchison*, 349 U. S. 133, 99 L. Ed. 942 (1955), are completely inapposite. In the case at bar it was the jury and not the judge who determined the guilt or innocence of petitioner. *Pratt v. Weygandt* was a divorce case to be decided entirely by the trial judge, and mandamus to compel his replacement was refused. *McFadden v. United States*, 63 F (2) 111 (CA 7, 1933), not cited by the court below, is also distinguishable as involving a trial to the judge without a jury. Similarly, in *Tumey v. Ohio*, the United States Supreme Court held improper state provisions for trial of liquor law violations before a village mayor who was to retain the amount of his costs in each case of conviction, in addition to his

salary. The Court said, 'But no fees or costs in such cases are paid him except *by the defendant if convicted.* There is, therefore, no way by which the mayor may be paid for his service as judge, *if he does not convict* those who are brought before him * * *.' 273 U. S. 520, 71 L. Ed. 753. (Emphasis supplied.) The Court also noted that 'all questions of judicial qualification may not involve constitutional validity. Thus matters of * * * personal bias * * * seem generally to be matters merely of legislative discretion.' 273 U. S. 523, 71 L. Ed. 754. *In re Murchison* involved the Michigan 'one-man grand jury' statute and the Supreme Court held that due process was denied where the judge presiding at a contempt hearing had also served as the 'one-man grand jury' out of whose proceedings the contempt charges arose. The distinction between these cases and the case at bar is obvious." (App. A, pp. s.39-s.40.)

There is no basis in the trial record for any finding that the trial judge did not discharge his duties with due regard for the constitutional rights of the petitioner to a fair trial.

III.
LIE DETECTOR TESTIMONY.

It is not a fact, as stated by present counsel (Pet. p. 32) that defense counsel "cited specifically" the publicity given petitioner's refusal to take a polygraph test when he sought a change of venue and/or a continuance. And, publicity concerning the lie detector occurred months before the trial.

The petitioner did not allege as error in the state courts, the admission of testimony concerning his unwillingness to take a lie detector test.

The District Court found that it had jurisdiction to consider this alleged error even though it was not urged on appeal to the Ohio Courts (R. pp. 464a-465a); and

found further that the trial judge had the duty of instructing the jury that no inference could be drawn from petitioner's refusal to submit to such a test, and by failing to do so, he violated petitioner's constitutional rights. (R. p. 468a.) The court quotes from *Fay v. Noia*, 372 U. S. 391, as authority for taking jurisdiction on this issue although it was not raised in the state courts.

Failure to obtain review in the state courts on this issue was not because any appellate remedies were withheld by the state courts as in *Noia, supra*, and all that *Noia* stands for is that failure to timely appeal from a state conviction did not bar federal habeas corpus relief under exceptional circumstances. For this Court said in *Noia*, 372 U. S. 391, at pages 428-429:

> "It is a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the co-presence of federal grounds. See, e.g. NAACP v. Alabama, 357 U. S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 1163; Fox Film Corp. v. Muller, 296 U. S. 207, 80 L. Ed. 158, 56 S. Ct. 183. Section 25 of the Judiciary Act of 1789, c 20, 1 Stat. 85-87, denied this Court power to base the reversal of a state court decision on any error other 'than such as * * * immediately respects * * * questions of validity or construction of the said (Federal) constitution, treaties, statutes, commissions, or authorities in dispute.' The deletion of the express restriction by the Judiciary Act of February 5, 1867, c 28, Sec. 2, 14 Stat. 386-387, did not enlarge this Court's power in that regard. * * *"

This Court stated also in *Noia*, 372 U. S. 391, at p. 441:

> "Noia's case stands on its own. * * *"

We contend that by this piecemeal consideration of an issue that could have been raised in the state courts, the

District Court encroached upon the state appellate court's prerogative to search the record and determine whether the admission of this testimony and the instruction of the trial court was error, and if error there was, whether it was prejudicial.

And the cases cited by the District Court in the instant case, namely, *Frye v. United States*, 293 F. 1013 (D. C. Cir. 1923), *Ohio v. Smith*, 113 O. App. 461 (1960), and *New Jersey v. Driver*, 183 A. 2d 655 (1962) are decisions in which appellate courts were exercising their appellate court prerogatives in determining whether there was prejudicial reversible error in the admission or exclusion of evidence pertaining to the lie detector.

As stated in *Wolf v. Nash*, 313 F. 2d 393 (C. A. Mo.) (8th Cir.) (1963), certiorari denied, 83 S. Court 1713, 374 U. S. 817, 10 L. Ed. 2d 1041, the due process clause of the 14th Amendment does not enable a federal court to review errors of state law.

Furthermore, there is no foundation in the record for the raising of any claim that the petitioner's constitutional rights were violated in the admission of conversations between the petitioner and the officers concerning the lie detector. The defense went into the matter also on the trial, on this issue. How was the petitioner denied due process of law under the circumstances?

The trial court instructed the jury that a person is not compelled to take a lie detector test (Tr. 3852). The trial court had nothing before it upon which to instruct the jury further concerning the lie detector. In relating his first conversation with the petitioner about taking a lie detector test, Officer Schottke testified on direct examination:

> "He was then asked if he would take a lie detector test and he said 'yes.' He asked how a lie detector

worked and we told him that it takes the reaction of the respiratory system.

* * * He said that due to his present condition, that he didn't feel as though this would be a fair test and that he would not want to take the test at this particular time.

We told him that he would be able to take the test, if he wanted to, at the time when he felt better." (Tr. 3950-3951.)

No objection was made to this testimony.

On cross-examination of Officer Schottke, defense counsel questioned him as follows regarding a later conversation he had with the petitioner:

"Q. Now, during that conversation you asked him about the lie detector again, didn't you?

A. I don't recall at this particular time whether I did or not.

Q. Well, to try and refresh your memory, did you say to him, 'Doctor, are you still willing to take a lie detector test?'

A. I don't recall at this time, sir.

Q. And did he say to you that, 'I am willing, but not one that will be conducted by the Cleveland Police Department, because you have already accused me'?

Did he answer you that way?

A. I don't recall.

Q. And did he add that, 'If you can find somebody that is competent in a community far removed from the city of Cleveland,' that he would be willing to accompany you and take the test that you requested of him?

A. I don't recall that conversation.

Q. You don't recall that. But you wouldn't say to this Court and jury, under the oath that you have accepted to tell the truth, that that conversation didn't take place, would you, Officer Schottke?

A. I don't recall at this time the conversation that you state." (Tr. 3727-3728.)

And on re-cross-examination, Officer Schottke was again questioned concerning the petitioner's willingness to take a lie detector test. (Tr. 3743.)

At Record 3846, Deputy Sheriff Rossbach related his conversation with the petitioner about taking a lie detector test. No objection was made to this testimony. It was not until later on, during Rossbach's testimony, that the defense, for the first time, objected to testimony concerning the lie detector (Tr. 3851) which was followed by the court's instruction to the jury that no one is compelled to take a lie detector test.

Despite the above objection, Dr. Sheppard when testifying in his own behalf on direct examination by his counsel, told about the first request that he submit to a lie detector test and stated that he told the officers he would be willing to submit to such examination "if it was a reliable test."

On direct examination, the petitioner testified:

> "A. Officer Schottke said that, would I submit to a so-called lie detector test, and I said I certainly would if it was a reliable test." (Tr. 6298.)
>
> * * *
>
> "the last I knew, the lie detector has—the so-called lie detector was far from infallible, but if it were, I would certainly take it." (Tr. 6298-99.)

The petitioner, of course, had not submitted to any lie detector test, but in view of what the record shows, where is there any support for holding that the admission of this testimony constituted prejudicial reversible error, or that the petitioner was denied due process of law on this issue. The trial court in instructing the jury that no one is compelled to take a lie detector test was merely applying a rule of evidence. This raises no federal question. As

stated in *Buchalter v. People of State of New York*, 319 U. S. 427, 431, 63 S. Ct. 1129, 1131, 87 L. Ed. 1492:

> "The due process clause of the 14th Amendment does not enable us to review errors of state law however material under that law. See also Lisenba v. People of State of California, 314 U. S. 219, 226-229, 62 S. Ct. 280, 86 L. Ed. 166."

The District Court found that Mayor Houk's testimony concerning the taking of a lie detector test permitted the jury to infer that he had passed the test and that Houk was not on trial. (R. p. 469a.)

Houk was merely a witness in this case, not the defendant. The petitioner's brother, Dr. Steve Sheppard, had filed charges with the police against Mayor Houk, and Houk's willingness to take the lie detector test was simply one item of fact to show both his attitude and conduct. It certainly does not raise any constitutional issue for the petitioner because Mayor Houk took a lie detector test, nor could it be consistently claimed that the petitioner was denied due process of law because Mayor Houk was willing to take a lie detector test.

In the instant case, the State court by its instruction to the jury concerning the lie detector was merely interpreting state law. There is no adequate federal basis for the finding of the district court on this issue. The mere suggestion that the petitioner submit himself to certain tests did not deny him due process of law. He did not take any tests nor was he compelled to do so.

The Court of Appeals stated:

> "* * * We cannot find that the handling of this matter deprived the petitioner of any federally granted constitutional rights. If there was fault in what occurred, it was a nonconstitutional error which should have been assigned on appeal. Habeas corpus

is not to be employed as a substitute for appeal. *E.g.*, *Oyler v. Tayor*, 338 F (2) 260, 262 & n. 3 (CA 10, 1964); *Allen v. Bannan*, 332 F (2) 399, 402 (CA 6, 1964); *Barker v. Ohio*, 328 F (2) 582, 584-85 (CA 6, 1964); *Worth v. Michigan*, 291 F (2) 621, 622 (CA 6, 1961), *cert. denied*, 368 U. S. 862 (1961); *Anderson v. Jones*, 281 F (2) 684, 686 (CA 6, 1960).

"We think that the observations of the Seventh Circuit in *United States ex rel. Townsend v. Ogilvie*, 334 F (2) 837, 843-44 (1964) are pertinent here.

> 'The (federal) court does not possess a residuum of power to search the record for procedural errors not involving constitutional rights and issue a writ of habeas corpus for the purpose of providing a new trial in the state court.
>
> 'A federal court acting in this fashion would constitute a super appellate tribunal and encroach upon state appellate court prerogatives; such action would affront the principles of federalism upon which our federal-state juridic system operates.'

"At this distance, we cannot say that the decision of Dr. Sheppard's veteran counsel to withhold objection to the lie detector evidence prejudiced their client. It goes without saying that Dr. Sheppard's conviction does not prove such.

"As proud as we are of the great traditions of our courts and their concern for the rights of those accused of crime, we are aware that like all human institutions they seldom act with perfection. It is not difficult, after ten years of searching analysis and contemplative study and the announcement of some new judicial attitudes, to find some imperfections in the conduct of a trial and to conclude that a judge or any attorney could have done a better job. But stability of the law and a nation's respect for its courts will disappear if, long after the event, their judgment may be set aside because a trial judge's discretion was less than perfectly exercised or because it is thought that

the trial plan of defense counsel was not the best that could have been employed. This must be especially true where an accused has enjoyed adequate and full opportunities for appellate review." (Pet. App. A, pp. s.48-s.49.)

The right to present error with respect to a disclosure that the petitioner had refused to take a lie detector test was waived by counsel. The witnesses were cross-examined on the subject and the defense by the petitioner's own testimony on direct examination got before the jury the disbelief of people generally that such tests are reliable and thus avoided any unfavorable inferences (Tr. 6298-99). Counsel had presumably taken the position that to explore the subject in detail would be advantageous to his cause. Cf. *United States v. Bando,* 244 F. 2d 833 (1957), cert. den. 355 U. S. 844, 2 L. Ed. 2d 53, 78 S. Ct. 67; *Rank v. State* (1962, Alaska), 373 P. 2d 734. Further, the function of the trial jury to assess the credibility of the petitioner was not usurped by the introduction of any results of a lie detector test.

IV.

ALLEGED MISCONDUCT OF BAILIFFS IN ALLOWING JURORS TO CALL THEIR FAMILIES.

This issue was before this Court on the previous petition for a writ of certiorari.

We wish to point out, at the outset, that the matters complained of took place in the hotel room when some of the jurors called their husbands or children on the telephone, and not in the jury room during the deliberations. The jurors deliberated in a room above the court room in the Criminal Courts Building and there is absolutely no evidence in the record showing any misconduct of the jury or of the officers in charge.

The telephone calls to the husbands and children of the jurors, all made in the presence of the bailiff, were not made during the deliberations of the jury. They were made from the hotel room to which they had been taken from the jury room and there is no evidence whatsoever that the case was even discussed in these telephone calls, much less anything said prejudicial to the petitioner.

There is no evidence whatsoever of telephone conversations with strangers. The testimony of Bailiff Edgar Francis follows:

> "Q. Do you know, of your own knowledge, whether there were any telephone communications made out of any of the respective rooms that were occupied by any members of the jury?
>
> A. Their phones were cut out, Mr. Garmone.
>
> Q. By whose request?
>
> A. Mr. Steenstra arranged that.
>
> Q. And were there any telephone calls made from the room that you occupied?
>
> A. Yes, sir.
>
> Q. Did you make the calls, or did the jury make the calls?
>
> A. No. The jury made the calls, and I sat in the chair right alongside the telephone.
>
> * * *
>
> Q. Mr. Bailiff, what was the purpose of the calls that the jurors made in your presence?
>
> * * *
>
> A. Well, they were made to their husbands and wives, and those that had children, they talked to the children.
>
> Q. Was there any conversation whatsoever about this case or their deliberations?
>
> A. Not one word, Mr. Parrino." (Tr. 7084-7085.)

The defense saw fit to call certain jurors to the witness stand on their motion for new trial and if they wished to

pursue this matter further, they had the right and opportunity so to do. They chose not to do so and there is nothing in the record whatever of anything having been said or done either by the bailiffs or by or to the jurors prejudicial to the petitioner.

The trial court stated when a supplemental motion for new trial was filed:

> "The court named Simon Steenstra, permanent criminal jury bailiff and Edgar Francis his own courtroom bailiff as the persons to have charge of the jury in their movements during the period of deliberation. They were named in open court in the presence of all interested parties. Both were well known to all parties, with the possible exception of defendant, and not a word of objection was voiced by anyone. Furthermore, one of counsel for the defense saw the court in chambers prior to the selection of said bailiffs and inquired of the court who he intended to appoint to take charge of the jury during the deliberation period. Upon being informed that the court would name Bailiffs Steenstra and Francis he expressed his wholehearted approval." (R. p. 47a.)

The Supreme Court of Ohio in the opinion states:

> "Defendant contends that he was prejudiced in this case by the actions of two officers of the court, in whose charge the jury was committed during its deliberations, in permitting some members of the jury to make unmonitored telephone calls in violation of Section 2945.33, Revised Code, which reads as follows:
>
> > 'When a cause is finally submitted the jurors must be kept together in a convenient place under the charge of an officer until they agree upon a verdict, or are discharged by the court. The court may permit the jurors to separate during the adjournment of court overnight, under proper cautions, or under supervision of an officer. Such officer shall not per-

mit a communication to be made to them, nor make any himself except to ask if they have agreed upon a verdict, unless he does so by order of the court * * *.'

"It is conceded that no authorization for such telephone calls was given by the court.

"At the conclusion of each day's deliberation, the members of this jury were housed in the Carter Hotel, under the supervision of two court bailiffs. The record reveals that the telephones in the hotel rooms occupied by individual jurors had been 'cut out.' However, some of them were permitted to make calls on the telephone in the room of one of the bailiffs.

"Counsel for defendant rely upon State v. Adams, 141 Ohio St. 423, 48 N. E. (2d) 861, 146 A. L. R. 509, as authority for their contention that the action of the bailiff in permitting these telephone calls constituted error prejudicial to the defendant. They cite the third paragraph of the syllabus of that case, which reads:

'The violation by a court officer in charge of a jury of Section 13448-1, General Code (Section 2945.33, Revised Code), to the effect that he shall not communicate with a jury in his charge or custody except to inquire whether it has reached a verdict, will be presumed to be prejudicial to a defendant against whom, after such communication, a verdict is returned by such jury.'

"A mere reading of the following fourth paragraph of the syllabus of the Adams case should be sufficient to distinguish that case from the present one:

'Where a court bailiff, on being informed by the jury during its deliberations that it could not agree, stated to it: 'You can't do that. You must reach a decision if you have to stay here for three months,' there is a violation of the statute which is prejudicial to a defendant against whom, following such declaration, a verdict is returned by the jury.'

"The case of Emmert v. State, 127 Ohio St. 235, 187 N. E. 862, 90 A. L. R. 242, although not cited by defendant, might also be authority for the proposition that misconduct of a bailiff is ground for reversal. That case, however, is also readily distinguishable from the present one. In the Emmert case the officer in charge of the jury, at a time when it was not actually in its deliberative sessions, said to certain members of the jury: 'My God, you are all wet. Judge Stahl expects you to return a verdict of guilty and if you don't it will be just too bad.' Other remarks of a similar nature to the effect that the jury had to reach a verdict were made by the bailiff.

"In situations such as those in the Adams and Emmert cases, it is easy to presume prejudice to the defendant as a result of the conduct of the bailiff. Can the same be said of the conduct of the bailiffs here in permitting jurors, who for several days and nights had been sequestered and unable to see or hear from their husbands, wives or children, to telephone those members of their families? We do not think so. There is, on the contrary, every reason to believe that assurances of the health and welfare of their loved ones would tend to ease the jurors' minds as to personal matters and would make them better, more conscientious jurors. Time after time, the members of this jury were instructed by the court not to communicate with anyone concerning this case or permit anyone to communicate with them about it. We must assume they followed the court's instructions. No complaint is made that they disregarded these instructions every night for some seven weeks that they were allowed to go home at the close of each day's session of the trial. It is difficult to visualize a juror who will follow a court's instruction during the many hours he spends each evening and week end with his family and then deliberately disregard that instruction in a few brief moments he speaks to a member of his family on the telephone in the presence of a bailiff.

> "The law in Ohio is that no judgment of conviction shall be reversed in any court for any cause unless it appears affirmatively from the record that the defendant was prejudiced thereby or was prevented from having a fair trial. Section 2945.83, Revised Code. There is no such affirmative showing of prejudice here, and this Court will not presume a prejudice as a matter of law from the fact that some of the jurors made telephone calls to members of their immediate families." (R. pp. 111a-113a.)

The District Court says that the Supreme Court of Ohio should have granted a new trial because of the unequivocal language of Section 2945.33, *supra*, and cites *Mattox v. United States*, 146 U. S. 140 (1892). But in the *Mattox* case, which was heard on appeal, communications with the jury were shown to be harmful. A newspaper account of the case was introduced into the jury room during deliberations, bearing upon the merits of the case. The record in the instant case, however, affirmatively shows that the telephone calls made by the jurors to members of their immediate families were harmless. The District Court's conclusion that they were harmful to the petitioner is again based upon a suspicion that the jurors were not to be trusted in following the instructions of the court not to discuss the case with anyone.

Further, we cannot see where a Federal District Court has any jurisdiction on habeas corpus to interpret a state statute such as Section 2945.33, or determine how that law should be applied by the state courts in the light of the facts in a particular case. The Supreme Court said in *Townsend v. Sain*, 372 U. S. 293, 311-12 (1963):

> "The whole history of the writ * * * refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review."

The Court of Appeals stated:

"* * * Here again the District Judge placed reliance on cases the facts of which disclose their lack of resemblance to the case before him and us. *State v. Adams,* 141 Ohio St. 423, 48 NE (2) 861, 146 ALR 509 (1943); *Emmert v. State,* 127 Ohio St. 235, 187 NE 862, 90 ALR 242 (1933); and *Mattox v. United States,* 146 U. S. 140, 36 L. Ed. 917 (1892). In *State v. Adams,* a bailiff who had been told by the jury that it could not agree said to them, 'you can't do that. You must reach a decision if you have to stay here for three months.' In *Emmert v. State,* the officer in charge of the jury remarked to certain jurors, 'My God, you are all wet. Judge Stahl expects you to return a verdict of guilty and if you don't it will be just too bad.' Aside from this obvious inappositeness, these Ohio cases were found not controlling of this case by the Ohio Court. *Mattox v. United States* involved direct review of a federal trial. Because the dissenting opinion frequently cites *Mattox* to support its conclusions, we have set out in the margin Chief Justice Fuller's recital of the facts in *Mattox* because it discloses a situation totally different from the facts of the present case * * *." (Pet. Appendix A, pp. s.52-s.54.)

The Court of Appeals continued:

"* * * The showing that communications were had with the jurors, accordingly, is not of itself enough to demonstrate a denial of due process. So in *Near v. Cunningham,* 313 F. (2) 929, 933 (CA 4, 1963), the court ruled that 'should it appear that prejudicial statements were made in the presence or hearing of the jurors,' the habeas corpus court must reach its constitutional decision 'in the light of all of the surrounding circumstances.' Here there is no pretense at showing that prejudicial statements were made to the jurors by their children or spouses. The pre-

sumption that the jurors remained true to their instructions is fortified by petitioner's neglect of his opportunity to show that the jurors chose this particular opportunity among many to violate their instructions. In view of the absence of any attempt to demonstrate or even claim such violations here, we are satisfied that the Ohio Supreme Court correctly disposed of this issue, and that in any event the occurrence does not present a denial of constitutional due process." (Pet. Appendix A, pp. s.55-s.56.)

The Supreme Court of Ohio in interpreting Section 2945.33, *supra,* in the light of the facts in the instant case, was exercising appellate jurisdiction over state legislation. Under Section 2945.83, *infra,* pp. 82-83, it must affirmatively appear from the record that these telephone calls were harmful. There is no proof and none was offered on the motion for new trial, that the calls were anything but harmless.

V.

OTHER ALLEGED CONSTITUTIONAL VIOLATIONS.

The claims under this heading in the petitioner's brief are unsupported by any findings by the District Court, and to avoid needless repetition, we incorporate herewith by reference, the argument we presented to this Court on these various issues in our previous amicus curiae brief.

The petitioner's brief makes reference to matters concerning the possession of the home of the petitioner and it is argued that a Dr. Paul Leland Kirk discovered a large blood spot in the murder room that did not come from the petitioner; that if the jury had had this evidence, they would have acquitted.

Neither the record of the trial nor the affidavits in support of the motion for new trial on the ground of newly

discovered evidence disclose a single instance of a denial of access to the premises for purposes of examination or inspection by the defense.

It is also to be noted that the premises were available for such inspection or examination from July 4th until the middle of December when the cause was finally submitted to the jury; that Dr. Kirk did not make his investigation until January 22nd to January 26th, 1955, a month after the Sheppard family had not only the keys but complete possession of the premises.

The record of this case shows the extreme importance of numerous articles of property within the home and a number of such articles appear as exhibits in the evidence. It was also necessary to continue the examination of the premises for blood spots, fingerprints, etc., by the scientific unit of the Cleveland Police Department. It was also necessary to continue the examination and search in and about the house for possible clues and particularly for the still missing T-shirt and weapon. The whole episode in the closing days of the trial, and the demand for the keys to the home in the presence of the jury, was a grandstand play and show, and nothing else.

In the meantime, the petitioner and his counsel had, on more than one occasion, visited the home, went through all the rooms and examined the house, both inside and outside.

The petitioner removed his medical bags and the contents. He and the members of his family also removed his clothing, his son's clothing, and various other articles. Also removed were his automobiles, consisting of a Jaguar, a Lincoln Continental and a jeep. Except for the Lincoln Continental, all of these articles of property were removed within a week or two following the murder of Marilyn Sheppard and became unavailable for further examination

by the scientific unit of the Cleveland Police Department when, at a later date, the case was turned over to them for further investigation.

VI.

SUFFICIENCY OF THE EVIDENCE.

This claim of the petitioner that the evidence on the trial was insufficient, was considered by the Court of Appeals, and the Court said:

> "One further subject should be briefly mentioned. Dr. Sheppard's petition claimed that the evidence at his trial was constitutionally insufficient to justify submitting the issue of guilt or innocence to the jury. This claim was neither withdrawn nor sustained upon the hearing in the District Court. On this subject, the petitioner's brief states,
>
> 'The District Judge expressly declined to consider this issue * * *, although in all fairness it should be stated that counsel for petitioner-appellee on several occasions offered to waive this claim of error. * * * No waiver was required, however, *and the issue remains.* This Court no doubt has the power, since the trial transcript is before it as an exhibit from the District Court to search the record and conclude that the allegation of insufficiency is well-taken.' (Emphasis supplied.)
>
> "We construe this as a suggestion that we pass upon this point only if we find in his favor. Counsel continues as follows:
>
> 'Appellee neither asks nor urges such relief, for he is ready, willing and anxious to stand retrial in any community not infected with an envenomed atmosphere, and a favorable ruling upon this issue would cause jeopardy to attach to the 1954 trial. This is not, however, to be taken as any concession that there was sufficient evidence to constitutionally support a judgment of conviction in the first in-

stance, for we vigorously contend that there was not. We simply do not press it at this time.'

"The Court of Appeals decision, affirmed by the Ohio Supreme Court, fully discussed the evidence and found it sufficient for submitting the issue of guilt to the jury. 100 Ohio App. 345. No claim is made here that that court's detailed recital of the evidence adduced at the trial is substantially erroneous. Without attempting to assess petitioner's actual guilt or innocence, this recital clearly establishes that Dr. Sheppard's conviction is not 'so totally devoid of evidentiary support' as to constitute a denial of due process. *Garner v. Louisiana*, 368 U. S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U. S. 199 (1960); *Hall v. Crouse*, 339 F. (2) 316 (CA 10, 1964).

"Petitioner apparently desires to save something for a further entry into or a rehearing in the District Court. We think that Ohio's appeal has brought the entire habeas corpus proceeding to us. We have passed upon it and do not find any basis for the release of Dr. Sheppard or the granting of a new trial." (Pet. Appendix A, pp. s.57-s.58.)

VII.

THE AGGREGATION OF ERROR.

On this issue, the Court of Appeals appropriately said:

"Each of the 'errors' discussed above was found by the District Judge to constitute a deprivation of due process, but he concluded his opinion with the observation that when taken together they reduced the trial to a 'mockery of justice.' Without further discussion, we are unable to attribute to a combination of these several claims a constitutional potency they lack individually. We have rejected the claims based on publicity, alleged bias of the trial judge, and communications with the jurors because no showing has been made that anything improper in fact occurred; we are no more willing to presume infirmity when

these claims and the matter of the lie detector evidence are listed together than when they are considered separately." (Pet. App. A, p. s.56.)

CONCLUSION.

The opinions of newspaper editors and newspaper articles should not be received as a substitute for evidence, nor as a substitute for the well-reasoned opinions of the trial and reviewing courts based upon the record.

This case stood adjudicated on the merits when this Court denied certiorari and denied a rehearing. Certainly, habeas corpus should not be permitted to be used as another appeal on the merits.

There was no interference by the news media with the handling of this trial by the trial judge, nor did the State trial judge deprive this petitioner of any constitutional right on the trial itself.

As the trial record shows, there was no justification for the retrospective application by the District Judge of *Rideau* and *Irvin*, *supra*.

Section 2945.83 of the Revised Code of Ohio, governing the state courts on review, provides:

> "2945.83 (13449-5). When new trial shall not be granted.
>
> No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:
>
> (A) Any inaccuracy or imperfection in the indictment, information, or warrant, provided that the charge is sufficient to fairly and reasonably inform the accused of the nature and cause of the accusation against him;
>
> (B) A variance between the allegations and the proof thereof unless the accused is misled or prejudiced thereby;

(C) The admission or rejection of any evidence offered against or for the accused unless it *affirmatively appears on the record* that the accused was or may have been prejudiced thereby;

(D) A misdirection of the jury unless the accused was or may have been prejudiced thereby;

(E) Any other cause unless it appears *affimatively from the record* that the accused was prejudiced thereby or was prevented from having a fair trial."

This state statute is in conformity with the ruling of this Court in many cases. As the Court of Appeals stated:

"Before examining in detail the nature of the publicity given Dr. Sheppard's case, it is well to note that he must carry the burden of demonstrating the constitutional vice in his conviction. As stated by the First Circuit in another publicity case, 'the question whether jurors are impartial in the constitutional sense is one of mixed law and fact as to which the challenger has the burden of persuasion * * *.' *Geagan v. Gavin*, 292 F. (2) 244, 246 (CA 1, 1961), *cert. denied*, 370 U. S. 903 (1962). This burden is one which must be carried ' "not as a matter of *speculation but as a demonstrable reality.*" ' *United States ex rel. Darcy v. Handy*, 351 U. S. 454, 462, 100 L. Ed. 1331, 1338 (1956) (emphasis supplied); *Stroble v. California*, 343 U. S. 181, 198, 96 L. Ed. 872, 885 (1952). See also *Adams v. United States ex rel. McCann*, 317 U. S. 269, 281, 87 L. Ed. 268, 276 (1942)." (Pet. App. A, s.8.)

* * *

"The facts of this case do not add up to any of the situations in which the Supreme Court of the United States or any United States Court of Appeals has found it appropriate to strike down a judgment affirmed by the highest court of a state." (Pet. App. s.59.)

We respectfully submit that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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FILE
FEB 2 3 19
JOHN F. DAVIS,

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 490.

SAMUEL H. SHEPPARD,

Petitioner,

vs.

E. L. MAXWELL, Warden,

Respondent.

REPLY BRIEF OF AMICI CURIAE, AMERICAN CIVIL LIBERTIES UNION AND OHIO CIVIL LIBERTIES UNION.

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Respondent concedes[1] that "there are * * * times when the very nature of the pretrial *newspaper* publicity is such that a court may reasonably infer therefrom, without examining the voir dire record, a conclusive presumption of * * * prejudice against an accused * * *."[2]

But respondent[3] denies, however, that this case presents one of those occasions of inherent prejudice for two principal (and several subsidiary) reasons:

---

[1] A concession compelled by *Tumey v. Ohio*, 273 U. S. 510, 532 (1927), *In re Murchison*, 349 U. S. 133, 136 (1955), *Rideau v. Louisiana*, 373 U. S. 723 (1963) and *Estes v. Texas*, 381 U. S. 532 (1965). See discussion, pp. 12-15, brief in chief of *amici*.

[2] RB 54. References to respondent's brief throughout this brief will be by "RB" followed by a page number. Reference to the *amicus brief* of the Cuyahoga County Prosecuting Attorney will be by "PAB" followed by a page number. Emphasis and bracketed material, unless otherwise indicated, has been supplied.

[3] The arguments of the respondent and the Cuyahoga County Prosecutor as *amicus curiae* will, unless otherwise indicated, be considered together.

I. The "probable effect" and "actual effect" of the trial and pretrial publicity was not prejudicial to the accused, because:

A. The newspaper publicity considered as a whole demonstrates that defendant, his family and his counsel induced or received favorable publicity as well as damaging news media coverage.[4]

B. The damaging publicity was diluted by the offer of evidence at the trial similar to the published matter.[5]

C. The damaging publicity consisted of insinuations, surmise and conjecture rather than direct evidentiary proof of the guilt of the accused.[6]

D. The damaging publicity was diluted by the time of trial because it had occurred two months earlier.[7]

E. Newspaper publicity is not as damaging as television exposure.[8]

F. Selected letters to the editor refute any inference of prejudice.[9]

II. Petitioner has waived or cannot now assert a claim of prejudicial publicity, because:

A. Defense counsel failed to exhaust his peremptory challenges in empanelling the jury.[10]

---

[4] RB 55, 68-71; PAB 29-33, 35-39.

[5] RB 64-68, 83-84.

[6] RB 55-56, 71; PAB 10.

[7] RB 58-59.

[8] RB 55, 60-61.

[9] RB 73, Appendices A, B, C and D.

[10] RB 78.

B. The news clippings now in issue were not offered in evidence at the jury trial.[11]

C. Defense counsel's summation to the jury waived or estopped a subsequent claim of prejudice.[12]

These contentions will be considered in sequence below.

I.

THE "PROBABLE EFFECT" AND "ACTUAL EFFECT" OF THE TRIAL AND PRETRIAL PUBLICITY WAS NOT PREJUDICIAL TO THE ACCUSED.

Respondent has set up a standard against which the facts of the instant case are to be measured before inherent prejudice may be found—a standard which ignores completely this Court's recent judicial history. Respondent claims that before inherent prejudice may be presumed from the content of the publicity surrounding a criminal trial without a showing of actual prejudice, there must be "a finding that the *probable* effect of [the publicity] was to create a lasting opinion of guilt in the minds of the jurors" [13] and that such a presumption of prejudice "is justified only where the probable effect would be that *no reasonable man*, possessed of the honesty, integrity, intelligence, and sense of responsibility and fair play we normally accord to jurors, *could help but come to a conclusion from a reading of the publicity that the accused was guilty of the crime charged against him.*" [14]

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[11] PAB 11.

[12] PAB 14.

[13] RB 63.

[14] RB 61.

To suggest that no presumption of prejudice may arise unless the probable contamination of *all of the jurors* (assuming for purposes of the test that they are all reasonable, intelligent, honest, just and responsible) can be demonstrated, is not only a reckless misinterpretation of this Court's pronouncements on the matter, but also such a stringent standard that, where facts existed to meet it, no presumption would be necessary because the prejudice would be actually demonstrable from the record.

As this Court made clear in *Tumey v. Ohio*, 273 U. S. 510, 532 (1927):

> "the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a *possible* temptation to the average man * * * to forget the burden of proof required to convict the defendant * * * denies the latter due process of law."

This Court's quotation of this language with approval in *Estes v. Texas*,[18] providing its own emphasis for the word "possible," bears witness to the fact that this represents the current applicable standard. See also *Fahy v. Connecticut*, 375 U. S. 85 (1963) which holds that reversal of a conviction is required when there is a *reasonable possibility* that the procedures complained of *might have contributed* to the result.

Moreover, respondent's attempt to demonstrate that there was no "actual effect" of prejudice, in the case at bar, relying heavily upon the protestations of impartiality of the jurors on *voir dire* and the determination by the trial judge that the jury was fair and impartial, is irrelevant to a consideration of whether, absent any "substan-

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[18] 381 U. S. 532, 543 (1965).

tial nexus" [16] between the publicity and the trial, a presumption of inherent prejudice will arise.

Even if the *voir dire* examination appears on its face to show that an impartial jury has been empanelled, merely going through the form of obtaining jurors' assurances of impartiality is insufficient to satisfy due process requirements.[17] For "one cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pretrial publicity. *This is particularly true in the determination of issues involving the credibility of witnesses.*" [18] As Mr. Justice Jackson, concurring in *Krulewitch v. United States*, 336 U. S. 440, 453 (1949), has pointed out:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction."

Moreover, allowing the attitude of the trial judge to determine for all time the impartiality of the jury begs the question. For the trial judge's own bias resulting from the prejudicial publicity may have played a role in his determination of that very matter. See brief of *amici*, footnote 49, pp. 15-16.

It is neither necessary to examine "a particularized transcript of the *voir dire* examination of members of the jury" [19] nor to compel the accused to affirmatively demon-

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[16] *Rideau v. Louisiana*, 373 U. S. 723, 729 (1963) (Clark, J. dissenting).

[17] *Irvin v. Dowd*, 366 U. S. 717 (1961).

[18] *Delaney v. United States*, 199 F. 2d 107, 112-113 (1st Cir. 1952).

[19] *Id.* at 727 and see *Estes v. Texas*, 381 U. S. 532 (1965).

strate preconceptions of guilt[20] if the requisite nature of the publicity surrounding the trial is shown. Given such publicity, it is immaterial whether the evidence received by the jurors from the news media was inadmissible in court[21] or subsequently admitted into evidence at the trial[22] or whether confessions of guilt by the accused were published[23] or not.[24]

Within the scope of his inapposite standard, however, respondent urges specific grounds for his assertion that the publicity surrounding petitioner's trial was not prejudicial to the accused. These contentions will be met individually below.

A.

The newspaper publicity considered as a whole demonstrates that defendant, his family and his counsel induced or received favorable publicity as well as damaging news media coverage.

In an attempt to show the unprejudicial nature of the publicity here involved, defendant is charged with having instigated[25] or cooperated in obtaining[26] so much favorable publicity for himself, that "the only reasonable inference to be drawn from its nature is that no unequivocal and reasonable inference of petitioner's guilt could be formed." [27]

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[20] *Ibid.* and see *Delaney v. United States*, 199 F. 2d 107 (1st Cir. 1952) and *United States ex rel. Bloeth v. Denno*, 313 F. 2d 364 (2d Cir. 1963).

[21] *Marshall v. United States*, 360 U. S. 310 (1959).

[22] *Rideau v. Louisiana*, 373 U. S. 723 (1963).

[23] *Ibid.*

[24] *Estes v. Texas*, 381 U. S. 532 (1965). And see *Delaney v. United States*, 199 F. 2d 107 (1st Cir. 1952).

[25] PAB 29-33, 35-39.

[26] RB 55, 68-71.

[27] RB 71.

The weakness of this counterattack is manifest. While it is not here contended that in appropriate circumstances the prosecution may not respond to public statements made by the accused in limited fashion,[28] the balancing of the adverse publicity as a whole against the news articles sympathetic to accused[29] demonstrates, without more, the pitifully little assistance petitioner received from the news media in formulating favorable public opinion for himself. Self-serving statements by the accused and loyal comments by his family, attorney and friends—all normally to be expected from the guilty as well as the innocent—can hardly be expected to approach the persuasive appeal of the devastating and repeated accusations, assertions of petitioner's guilt and public review of incriminating evidence in advance of trial from such solid and apparently impartial sources as the police, detectives, prosecutors, prosecution witnesses and newspapermen.[30]

But the problem before the Court will not be solved by sifting the newspaper clippings, sorting out the "favorable" and "unfavorable" articles and balancing them against each other.

It must be remembered that it is the accused who must stand trial, it is the accused who risks his life and liberty, and it is the accused—not the state—who is guaranteed a fair and impartial jury trial by the Sixth and

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[28] It is not here contended by respondent that the spectacle in the instant case of public law enforcement authorities falling over themselves to make accusatory public comments was solely in response to petitioner's comments. The facts preclude such a contention. E.g., 56a-57a, *amici* brief in chief (unsolicited accusation of police captain on vacation in Miami).

[29] RB 68-71, appendices E, F, G, H and I. It is ironic to note that each of these examples of publicity "favorable" to the accused appears on a page which contains damaging publicity as well.

[30] Brief in chief of *amici*, pp. 17-18, 19-20, 22, 26 and examples there cited.

Fourteenth Amendments. The zeal of the accused to protect himself *at the trial level* from the effects of adverse publicity is more understandable and acceptable than similar acts of supposedly detached law enforcement authorities charged with the administration of justice.

Further, it must be emphasized that before and repeatedly during the trial the defense sought to disengage itself from the consequences of *all* of the publicity—favorable and unfavorable—by motions for change of venue, continuance and mistrial. The prosecution vigorously opposed all such attempts, apparently content with the public opinion climate in which it found itself, even after all of the "favorable" publicity petitioner is alleged to have received.

It cannot now be heard to claim that petitioner was favored by publicity whose effect upon his trial he desperately tried to avoid.

For many of these reasons, it has been held that where the defense "shared with the state responsibility for much of the publicity which made the selection of an impartial jury difficult * * * the ultimate responsibility lies with the state" and a conviction so obtained violates due process. *United States ex rel. Bloeth v. Denno*, 313 F. 2d 364, 372 (2d Cir. 1963).

B.

The damaging publicity was diluted by the offer of evidence at the trial similar to the published matter.

Respondent attempts to mitigate the prejudicial nature of the publicity cited by *amici* by suggesting that "if evidence * * * is actually introduced * * * at trial * * * its publication prior to trial obviously has far less significance in creating * * * unfairness."[31] To but-

[31] RB 64.

tress this contention, he examines some of the examples of publicity cited by *amici* [32] and attempts to explain them away as identical to evidence subsequently offered in court under appropriate safeguards.

Amici contend that (1) much of the evidence offered at trial, allegedly identical to the pretrial publicity of which *amici* complain, was, in fact, neither identical nor similar to that which was published, and (2) even if it were similar, its advance publication without appropriate safeguards was prejudicial to the accused, in any event.

For example, respondent attempts to mitigate the prejudicial effect of an article in which a police captain called petitioner a "bare faced liar" [33] by suggesting that at the trial "the jury had more than sufficient evidence before it to indicate petitioner had been less than truthful." [34] Further, respondent suggests that the highly prejudicial statement that the murder victim had characterized petitioner (a surgeon on trial for murder) as a "Dr. Jekyll and Mr. Hyde" [35] was neutralized because the prosecution witness to whom the statement was attributed testified at the trial that petitioner had an explosive temper.[36] An article which described a woman's hearsay statement that the murder victim had planned to divorce petitioner[37] was dismissed by respondent as inconsequential because, although the woman did not testify at

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[32] Under headings II and III in brief in chief of *amici*, pp. 19-23. It is significant to note that many of the prejudicial examples cited under headings I (prosecution-induced publicity) and IV (accusatory publicity) of *amici's* brief are neither mentioned, challenged nor explained away by respondent.

[33] *Amici* brief in chief, pp. 19-20.

[34] RB 65-66.

[35] *Amici* brief in chief, p. 20, 44a-45a.

[36] RB 66.

[37] *Amici* brief in chief, 13a-14a.

trial, other witnesses testified of petitioner's infidelity to his wife and his or his wife's desire for a divorce.

It is apparent that, even in the instances challenged by respondent, the newspaper accounts were more inflammatory than the subsequent evidence in court; and/or they quoted different sources for the evidence offered in court. These variations denied petitioner the opportunity to confront and cross-examine his accusers as to the precise direct testimony against him which was published in the community in which he stood trial.

But even if *identical* evidence had been offered at trial subsequent to the publication of the same material, the prejudicial effect of the publication in advance would still have been manifest. For even accurate publicity in advance of trial, repeated at the trial may create "opinions of guilt long before trial, far removed from any safeguards against inadmissible matter." [38]

C.

The damaging publicity consisted of insinuations, surmise and conjecture rather than direct evidentiary proof of the guilt of the accused.

Respondent contends that the newspaper articles in issue "contain no direct evidence of guilt * * * or even unequivocal accusations of guilt" [39] but, rather, consist of "insinuation, surmise, and conjecture." [40] Whatever mileage respondent hopes to get from this distinction without a difference, the simple fact is that it is not true.

When a police captain urged petitioner's arrest "for investigation of murder," pointing out that "if there had

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[38] *United States ex rel. Bloeth v. Denno*, 313 F. 2d 364, 373 (2d Cir. 1963).

[39] RB 55-56.

[40] RB 55.

been an immediate arrest, the case would have been solved in four hours,"[41] does respondent deny that this is an "unequivocal accusation of guilt"? Was the editorial inquiry: "Why Isn't Sam Sheppard in Jail?",[42] merely a matter of "conjecture"? Was the detailing in the newspaper of the "convicting evidence" against petitioner by the county coroner and the chief of the detective bureau[43] not "direct evidence of guilt"? *Amici* could continue in this vein for pages, but these few examples will suffice to make the point that no amount of wishful thinking by respondent will erase the fact that the publicity which surrounded petitioner's trial was inflammatory, pervasive, accusatory, unfair and grossly prejudicial.

D.

The damaging publicity was diluted by the time of trial because it had occurred two months earlier.

In considering the "probable effect" of the publicity on the jury, respondent finds significant his assertion that the worst of the publicity occurred more than two months before the trial.

The truth is that prejudicial publicity continued to the eve of trial[44] and throughout the trial.[45] But even if respondent's assertion were true, two months' delay between the prejudicial publicity and the trial is no impediment to a finding of inherent prejudice. In *Rideau v. Louisiana*, 373 U. S. 723 (1963), approximately two months elapsed between the publicity and the trial; in *Irvin v. Dowd*, 366 U. S. 717 (1961), the publicity ante-

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[41] *Amici* brief in chief, 56a-57a.
[42] *Id.* at 58a-59a.
[43] *Id.* at 60a-61a.
[44] E.g., *Amici* brief in chief, 32a-35a.
[45] E.g., id., 44a-45a.

dated the trial by some six or seven months; in *United States ex rel. Bloeth v. Denno*, 313 F. 2d 364 (2d Cir. 1963) about nine months elapsed between the worst of the publicity and the trial. In each of these instances, the Court reversed convictions without difficulty. The fact which is "significant" to respondent has no significance in the decided case law.

E.

Newspaper publicity is not as damaging as television exposure.

Respondent, apparently to avoid the implications of this Court's holdings in the television cases of *Rideau v. Louisiana*, 373 U. S. 723 (1963) and *Estes v. Texas*, 381 U. S. 532 (1965), dwells upon "the fundamental and obvious difference between * * * newspaper publicity and * * * television," [46] asserting authoritatively (but without authority) that television is "more likely to create lasting impressions than is newspaper publicity." [47]

On the basis of this distinction, respondent reasons that greater proof of prejudice is required where newspapers cause damaging publicity than where television publicity is responsible for interference with fair trial. [48]

This proposed "double standard" for dealing with newspaper and television impact upon fair trials wilts upon analysis. As this Court has recently pointed out in *Estes v. Texas*,[49] while "the circumstances and extraneous influences intruding upon the solemn decorum of *court procedure* in the televised trial are far more serious than in cases involving only newspaper coverage" (presumably

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[46] RB 55.

[47] RB 60.

[48] RB 61.

[49] 381 U. S. 532 (1965).

because television cameras, lights and cables are more cumbersome and noticeable than a newspaper reporter's pad and pencil), the dangers of out-of-court publicity "are present as well in newspaper coverage." [50]

In support of this conclusion, there is scientific evidence to support the contention that the printed word will normally have much greater impact upon the average juror than their visual and aural reception of witnesses' testimony.[51] Add the fact that it has been experimentally demonstrated that all news media are capable of producing marked changes in attitudes or strong attitudes where none previously existed,[52] and it becomes apparent that, at very least, the due process problems of newspaper and television publicity in relation to criminal trials are similar and require similar legal diagnosis, treatment and cure.

F.

Selected letters to the editor refute any inference of prejudice.

In attempting to prove the "actual effect" of the pretrial publicity to be non-prejudicial, respondent calls the Court's attention to various "letters to the editors" as "the only direct evidence in the record of *any* effect the *newspaper publicity* may have had." [53] Noting that "some of those who wrote letters were * * * critical of the press and/or they still believed in the proposition that an ac-

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[50] *Id.* at 548.

[51] Murphy & Newcomb, *Experimental Social Psychology* 962, 965-966 (rev. ed. 1937); Weld & Danzig, "A Study of the Way in Which a Verdict is Reached by a Jury," 53 Am. J. Psych. 518 (1940).

[52] *Murphy & Newcomb, supra,* note 48, at 961. See also Wright, *Mass Communications: A Sociological Perspective* 49-73 (1959).

[53] RB 73; appendices A, B, C and D.

cused was innocent until proven guilty," [54] he concludes that not only was there no community prejudice *against* petitioner, "but on the contrary there is unequivocal [!] evidence of the existence of sympathy toward and a belief in the innocence of Sam Sheppard." [55] Respondent proves too much. The restatement of the argument is its own refutation. Is respondent prepared to demonstrate that the letter-writers were a random sample of the community in which petitioner stood trial? Or might a substantial argument be made for the proposition that many of those who failed to write letters to the newspapers were either deliberately or unwittingly prejudiced, saw no occasion to complain about newspaper treatment of which they approved, and failed to write at all?

II.

PETITIONER HAS WAIVED OR CANNOT NOW ASSERT A CLAIM OF PREJUDICIAL PUBLICITY.

Respondent claims further that even if the publicity in the case at bar were prejudicial, petitioner cannot now complain because of various acts or omissions of his trial counsel. These claims will be reviewed in sequence below.

A.

Defense counsel failed to exhaust his peremptory challenges in empanelling the jury.

Noting that "the defense accepted [the] jury while still having one peremptory challenge remaining," respondent asserts that "petitioner therefore should not now be heard to complain at this late date." [56]

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[54] *Ibid.*

[55] RB 74.

[56] RB 78.

This technical contention misconceives the nature of the peremptory challenge and the strong presumption against waiver of constitutional rights. *Johnson v. Zerbst*, 304 U. S. 458 (1938).

Having preserved the question of prejudicial pretrial and trial publicity by repeated motions for continuance, change of venue and mistrial,[57] defense counsel's failure to exercise all his peremptory challenges cannot be construed as a waiver or abandonment of his right to review of these constitutional questions. How many times during the course of a trial must defense counsel procedurally preserve the same constitutional question?

Moreover, as the Court in *Delaney v. United States*, 199 F. 2d 107, 116 (1st Cir. 1952) has pointed out:

> "Nor do we think it significant that the defendant failed to exhaust his peremptory challenges at the time the jury was being selected. Since he was obliged to stand trial in the hostile atmosphere engendered by the extra-courtroom publicity, he had little or no reason for assuming that one juror rather than another would be more likely to be influenced, consciously or unconsciously, by his preconceptions —all of them having affirmed * * * that they were prepared to determine [defendant's] guilt or innocence solely on the basis of evidence produced at the trial."

B.

The news clippings now in issue were not offered in evidence at the jury trial.

Amicus Corrigan asserts that the newspaper clippings collected in bulk in the five green scrapbooks certified to this Court by the Court of Appeals are somehow not before the Court because they "were not offered in evidence

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[57] *Amici* brief in chief, p. 7, footnotes 17, 18.

by the prosecution, or received in evidence by the trial court" [58] in the petitioner's jury trial, despite the fact that they were offered and considered by the District Court and the Court of Appeals in this collateral proceeding, and despite the fact that defense counsel offered them as evidence in his motion for change of venue and continuance during the petitioner's jury trial.[59]

The argument refutes itself. Suffice to say that in *Estes v. Texas*, 381 U. S. 532, 533 (1965), this Court reviewed eleven volumes of press clippings on file with the clerk without their admission into evidence at the jury trial level. For the very point of the petitioner's complaint is that *extrajudicial* evidence contained in the newspaper publicity prejudiced his trial.

C.

Defense counsel's summation to the jury waived or estopped a subsequent claim of prejudice.

Amicus Corrigan seeks to demonstrate petitioner's concession that the jury was fair and impartial by quoting from his counsel's summation to the jury to the effect that he thought them to be uninfluenced by matters outside the trial.[60] That every trial lawyer compliments the jury is well known. Having preserved the issue of prejudicial publicity by motions for continuance, change of venue and mistrial, was defense counsel obligated to assert to the jury that their fairness was in question?

Amici urge that precious constitutional rights cannot be so easily frittered away.

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[58] PAB 11.

[59] R. 1352-1354.

[60] PAB 14.

CONCLUSION.

For the foregoing reasons, as well as for the reasons set forth in their brief in chief, *amici* renew their prayer that this Court reverse the decision of the Court of Appeals and grant the petitioner's application for a writ of habeas corpus.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 490.—October Term, 1965.

Samuel H. Sheppard, Petitioner,
v.
E. L. Maxwell, Warden.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 6, 1966.]

Mr. Justice Clark delivered the opinion of the Court.

This federal habeas corpus application involves the question whether Sheppard was deprived of a fair trial in his state conviction for the second-degree murder of his wife because of the trial judge's failure to protect Sheppard sufficiently from the massive, pervasive and prejudicial publicity that attended his prosecution.[1] The United States District Court held that he was not afforded a fair trial and granted the writ subject to the State's right to put Sheppard to trial again, 231 F. Supp. 37 (D. C. S. D. Ohio 1964). The Court of Appeals for the Sixth Circuit reversed by a divided vote, 346 F. 2d 707 (1965). We granted certiorari, 382 U. S. 916 (1966). We have concluded that Sheppard did not receive a fair trial consistent with the Due Process Clause of the Fourteenth Amendment and, therefore, reverse the judgment.

I.

Marilyn Sheppard, petitioner's pregnant wife, was bludgeoned to death in the upstairs bedroom of their lake-

[1] Sheppard was convicted in 1954 in the Court of Common Pleas of Cuyahoga County, Ohio. His conviction was affirmed by the Court of Appeals for Cuyahoga County, 100 Ohio App. 345, 128 N. E. 2d 471 (1955), and the Ohio Supreme Court, 165 Ohio St. 293, 135 N. E. 2d 340 (1956). We denied certiorari on the original appeal. 352 U. S. 910 (1956).

shore home in Bay Village, Ohio, a suburb of Cleveland. On the day of the tragedy, July 4, 1954, Sheppard pieced together for several local officials the following story: He and his wife had entertained neighborhood friends, the Aherns, on the previous evening at their home. After dinner they watched television in the living room. Sheppard became drowsy and dozed off to sleep on a couch. Later, Marilyn partially awoke him saying that she was going to bed. The next thing he remembered was hearing his wife cry out in the early morning hours. He hurried upstairs and in the dim light from the hall saw a "form" standing next to his wife's bed. As he struggled with the "form" he was struck on the back of the neck and rendered unconscious. On regaining his senses he found himself on the floor next to his wife's bed. He raised up, looked at her, took her pulse and "felt that she was gone." He then went to his son's room and found him unmolested. Hearing a noise he hurried downstairs. He saw a "form" running out the door and pursued it to the lake shore. He grappled with it on the beach and again lost consciousness. Upon his recovery he was laying face down with the lower portion of his body in the water. He returned to his home, checked the pulse on his wife's neck, and "determined or thought that she was gone." [2] He then went downstairs and called a neighbor, Mayor Houk of Bay Village. The Mayor and his wife came over at once, found Sheppard slumped in an easy chair downstairs and asked, "What happened?" Sheppard replied: "I don't know but somebody ought to try to do something for Marilyn." Mrs. Houk immediately went up to the bedroom. The Mayor told Sheppard, "Get hold of yourself. Can you tell me what hap-

[2] The several witnesses to whom Sheppard narrated his experiences differ in their description of various details. Sheppard claimed the vagueness of his perception was caused by his sudden awakening, the dimness of the light, and his loss of consciousness.

pened?" Sheppard then related the above-outlined events. After Mrs. Houk discovered the body, the Mayor called the local police, Dr. Richard Sheppard, petitioner's brother, and Aherns. The local police were the first to arrive. They in turn notified the Coroner and Cleveland police. Richard Sheppard then arrived, determined that Marilyn was dead, examined his brother's injuries, and removed him to the nearby clinic operated by the Sheppard family.[3] When the Coroner, the Cleveland police and other officials arrived, the house and surrounding area were thoroughly searched, the rooms of the house were photographed, and many persons, including the Houks and the Aherns, were interrogated. The Sheppard home and premises were taken into "protective custody" and remained so until after the trial.[4]

From the outset officials focused suspicion on Sheppard. After a search of the house and premises on the morning of the tragedy, Dr. Gerber, the Coroner, is reported—and it is undenied—to have told his men, "Well, it is evident the doctor did this, so let's go get the confession out of him." He proceeded to interrogate and examine Sheppard while the latter was under sedation in his hospital room. On the same occasion, the Coroner was given the clothes Sheppard wore at the time of the tragedy together with the personal items in them. Later that afternoon Chief Eaton and two Cleveland police officers interrogated Sheppard at some length, confronting him with evidence and demanding explanations. Asked by Officer Shotke to take a lie detector test, Sheppard said he would if it were reliable. Shotke replied that it was "infallible" and "you might as well tell us

[3] Sheppard was suffering from severe pain in his neck, a swollen eye, and shock.

[4] But newspaper photographers and reporters were permitted access to Sheppard's home from time to time and took pictures throughout the premises.

all about it now." At the end of the interrogation Shotke told Sheppard: "I think you killed your wife." Still later in the same afternoon a physician sent by the Coroner was permitted to make a detailed examination of Sheppard. Until the Coroner's inquest on July 22, at which time he was subpoenaed, Sheppard made himself available for frequent and extended questioning without the presence of an attorney.

On July 7, the day of Marilyn Sheppard's funeral, a newspaper story appeared in which Assistant County Attorney Mahon—later the chief prosecutor of Sheppard—sharply criticized the refusal of the Sheppard family to permit his immediate questioning. From there on headline stories repeatedly stressed Sheppard's lack of cooperation with the police and other officials. Under the headline "Testify Now In Death, Bay Doctor Is Ordered," one story described a visit by Coroner Gerber and four police officers to the hospital on July 8. When Sheppard insisted that his lawyer be present, the Coroner wrote out a subpoena and served it on him. Sheppard then agreed to submit to questioning without counsel and the subpoena was torn up. The officers questioned him for several hours. On July 9, Sheppard, at the request of the Coroner, re-enacted the tragedy at his home before the Coroner, police officers, and a group of newsmen, who apparently were invited by the Coroner. The home was locked so that Sheppard was obliged to wait outside until the Coroner arrived. Sheppard's performance was reported in detail by the news media along with photographs. The newspapers also played up Sheppard's refusal to take a lie detector test and "the protective ring" thrown up by his family. Front-page newspaper headlines announced on the same day that "Doctor Balks At Lie Test; Retells Story." A column opposite that story contained an "exclusive" interview with Sheppard headlined: " 'Loved My Wife, She Loved Me,' Sheppard Tells

News Reporters." The next day, another headline story disclosed that Sheppard had "again late yesterday refused to take a lie detector test" and quoted an Assistant County Attorney as saying that "at the end of a nine-hour questioning of Dr. Sheppard, I felt he was now ruling [a test] out completely." But subsequent newspaper articles reported that the Coroner was still pushing Sheppard for a lie detector test. More stories appeared when Sheppard would not allow authorities to inject him with "truth serum." [5]

On the 20th, the "editorial artillery" opened fire with a front-page charge that somebody is "getting away with murder." The editorial attributed the ineptness of the investigation to "friendships, relationships, hired lawyers, a husband who ought to have been subjected instantly to the same third degree to which any person under similar circumstances is subjected . . . ." The following day, July 21, another page-one editorial was headed: "Why No Inquest? Do It Now, Dr. Gerber." The Coroner called an inquest the same day and subpoenaed Sheppard. It was staged the next day in a school gymnasium; the Coroner presided with the County Prosecutor as his advisor and two detectives as bailiffs. In the front of the room was a long table occupied by reporters, television and radio personnel, and broadcasting equipment. The hearing was broadcast with live microphones placed at the Coroner's seat and the witness stand. A swarm of reporters and photographers attended. Sheppard was brought into the room by police who searched him in full view of several hundred spectators. Sheppard's counsel were present during the three-day inquest but were not permitted to participate.

[5] At the same time, the newspapers reported that other possible suspects had been "cleared" by lie detector tests. One of these persons was quoted as saying that he could not understand why an innocent man would refuse to take such a test.

When Sheppard's chief counsel attempted to place some documents in the record, he was forcibly ejected from the room by the Coroner, who received cheers, hugs, and kisses from ladies in the audience. Sheppard was questioned for five and one-half hours about his actions on the night of the murder, his married life, and a love affair with Susan Hayes.[6] At the end of the hearing the Coroner announced that he "could" order Sheppard held for the grand jury, but did not do so.

Throughout this period the newspapers emphasized evidence that tended to incriminate Sheppard and pointed out discrepancies in his statements to authorities. At the same time, Sheppard made many public statements to the press and wrote feature articles asserting his innocence.[7] During the inquest on July 26, a headline in large type stated: "Kerr [Captain of the Cleveland Police] Urges Sheppard's Arrest." In the story, Detective McArthur "disclosed that scientific tests at the Sheppard home have definitely established that the killer washed off a trail of blood from the murder bedroom to the downstairs section," a circumstance casting doubt on Sheppard's accounts of the murder. No such evidence was produced at trial. The newspapers also delved into Sheppard's personal life. Articles stressed his extra-marital love affairs as a motive for the crime. The newspapers portrayed Sheppard as a Lothario, fully explored his relationship with Susan Hayes, and named a number of other women who were allegedly involved with him. The testimony at trial never showed that

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[6] The newspapers had heavily emphasized Sheppard's illicit affair with Susan Hayes, and the fact that he had initially lied about it.

[7] A number of articles calculated to evoke sympathy for Sheppard were printed, such as the letters Sheppard wrote to his son while in jail. These stories often appeared together with news coverage which was unfavorable to him.

Sheppard had any illicit relationships besides the one with Susan Hayes.

On July 28, an editorial entitled "Why Don't Police Quiz Top Suspect" demanded that Sheppard be taken to police headquarters. It described him in the following language:

> "Now proved under oath to be a liar, still free to go about his business, shielded by his family, protected by a smart lawyer who has made monkeys of the police and authorities, carrying a gun part of the time, left free to do whatever he pleases . . . ."

A front-page editorial on July 30 asked: "Why Isn't Sam Sheppard in Jail?" It was later titled "Quit Stalling—Bring Him In." After calling Sheppard "the most unusual murder suspect ever seen around these parts" the article said that "[e]xcept for some superficial questioning during Coroner Sam Gerber's inquest he has been scot-free of any official grilling . . . ." It asserted that he was "surrounded by an iron curtain of protection [and] concealment."

That night at 10 o'clock Sheppard was arrested at his father's home on a charge of murder. He was taken to the Bay Village City Hall where hundreds of people, newscasters, photographers and reporters were awaiting his arrival. He was immediately arraigned—having been denied a temporary delay to secure the presence of counsel—and bound over to the grand jury.

The publicity then grew in intensity until his indictment on August 17. Typical of the coverage during this period is a front-page interview entitled: "DR. SAM: 'I Wish There Was Something I Could Get Off My Chest—but There Isn't.'" Unfavorable publicity included items such as a cartoon of the body of a sphinx with Sheppard's head and the legend below: "'I Will Do Everything In My Power to Help Solve This Terrible

Murder.' —Dr. Sam Sheppard." Headlines announced, *inter alia*, that: "Doctor Evidence is Ready for Jury," "Corrigan Tactics Stall Quizzing," "Sheppard 'Gay Set' Is Revealed By Houk," "Blood Is Found In Garage," "New Murder Evidence Is Found, Police Claim," "Dr. Sam Faces Quiz At Jail On Marilyn's Fear Of Him." On August 18, an article appeared under the headline "Dr. Sam Writes His Own Story." And reproduced across the entire front page was a portion of the typed statement signed by Sheppard: "I am not guilty of the murder of my wife, Marilyn. How could I, who have been trained to help people and devote my life to saving life, commit such a terrible and revolting crime?" We do not detail the coverage further. There are five volumes filled with similar clippings from each of the three Cleveland newspapers covering the period from the murder until Sheppard's conviction in December 1954. The record includes no excerpts from newscasts on radio and television but since space was reserved in the courtroom for these media we assume that their coverage was equally large.

II.

With this background the case came on for trial two weeks before the November general election at which the chief prosecutor was a candidate for municipal judge and the presiding judge, Judge Blythin, was a candidate to succeed himself. Twenty-five days before the case was set, a list of 75 veniremen were called as prospective jurors. This list, including the addresses of each venireman, was published in all three Cleveland newspapers. As a consequence, anonymous letters and telephone calls, as well as calls from friends, regarding the impending prosecution were received by all of the prospective jurors. The selection of the jury began on October 18, 1954.

The courtroom in which the trial was held measured 26 by 48 feet. A long temporary table was set up inside

the bar, in back of the single counsel table. It ran the width of the courtroom, parallel to the bar railing, with one end less than three feet from the jury box. Approximately 20 representatives of newspapers and wire services were assigned seats at this table by the court. Behind the bar railing there were four rows of benches. These seats were likewise assigned by the court for the entire trial. The first row was occupied by representatives of television and radio stations, and the second and third rows by reporters from out-of-town newspapers and magazines. One side of the last row, which accommodated 14 people, was assigned to Sheppard's family and the other to Marilyn's. The public was permitted to fill vacancies in this row on special passes only. Representatives of the news media also used all the rooms on the courtroom floor, including the room where cases were ordinarily called and assigned for trial. Private telephone lines and telegraphic equipment were installed in these rooms so that reports from the trial could be speeded to the papers. Station WSRS was permitted to set up broadcasting facilities on the third floor of the courthouse next door to the jury room, where the jury rested during recesses in the trial and deliberated. Newscasts were made from this room throughout the trial, and while the jury reached its verdict.

On the sidewalk and steps in front of the courthouse, television and newsreel cameras were occasionally used to take motion pictures of the participants in the trial, including the jury and the judge. Indeed, one television broadcast carried a staged interview of the judge as he entered the courthouse. In the corridors outside the courtroom there was a host of photographers and television personnel with flash cameras, portable lights and motion picture cameras. This group photographed the prospective jurors during selection of the jury. After the trial opened, the witnesses, counsel, and jurors were

photographed and televised whenever they entered or left the courtroom. Sheppard was brought to the courtroom about 10 minutes before each session began; he was surrounded by reporters and extensively photographed for the newspapers and television. A rule of court prohibited picture-taking in the courtroom during the actual sessions of the court, but no restraints were put on photographers during recesses, which were taken once each morning and afternoon, with a longer period for lunch.

All of these arrangements with the news media and their massive coverage of the trial continued during the entire nine weeks of the trial. The courtroom remained crowded to capacity with representatives of news media. Their movement in and out of the courtroom often caused so much confusion that, despite the loud speaker system installed in the courtroom, it was difficult for the witnesses and counsel to be heard. Furthermore, the reporters clustered within the bar of the small courtroom made confidential talk among Sheppard and his counsel almost impossible during the proceedings. They frequently had to leave the courtroom to obtain privacy. And many times when counsel wished to raise a point with the judge out of the hearing of the jury it was necessary to move to the judge's chambers. Even then, news media representatives so packed the judge's anteroom that counsel could hardly return from the chambers to the courtroom. The reporters vied with each other to find out what counsel and the judge had discussed, and often these matters later appeared in newspapers accessible to the jury.

The daily record of the proceedings was made available to the newspapers and the testimony of each witness was printed *verbatim* in the local editions, along with objections of counsel, and rulings by the judge. Pictures of Sheppard, the judge, counsel, pertinent witnesses, and the jury often accompanied the daily news-

paper and television accounts. At times the newspapers published photographs of exhibits introduced at the trial, and the rooms of Sheppard's house were featured along with relevant testimony.

The jurors themselves were constantly exposed to the news media. Every juror, except one, testified at *voir dire* to reading about the case in the Cleveland papers or to having heard broadcasts about it. Seven of the 12 jurors who rendered the verdict had one or more Cleveland papers delivered in their home; the remaining jurors were not interrogated on the point. Nor were there questions as to radios or television sets in the talesmen's homes, but we must assume that most of them owned such conveniences. As the selection of the jury progressed, individual pictures of prospective members appeared daily. During the trial, pictures of the jury appeared over 40 times in the Cleveland papers alone. The court permitted photographers to take pictures of the jury in the box, and individual pictures of the members in the jury room. One newspaper ran pictures of the jurors at the Sheppard home when they went there to view the scene of the murder. Another paper featured the home life of an alternate juror. The day before the verdict was rendered—while the jurors were at lunch and sequestered by two bailiffs—the jury was separated into two groups to pose for photographs which appeared in the newspapers.

III.

We now reach the conduct of the trial. While the intense publicity continued unabated, it is sufficient to relate only the more flagrant episodes:

1. On October 9, 1954, nine days before the case went to trial, an editorial in one of the newspapers criticized defense counsel's random poll of people on the streets as to their opinion of Sheppard's guilt or innocence in an

effort to use the resulting statistics to show the necessity for change of venue. The article said the survey "smacks of mass jury tampering," called on defense counsel to drop it, and stated that the bar association should do something about it. It characterized the poll as "non-judicial, non-legal, and nonsense." The article was called to the attention of the court but no action was taken.

2. On the second day of *voir dire* examination a debate was staged and broadcast live over WHK radio. The participants, newspaper reporters, accused Sheppard's counsel of throwing roadblocks in the way of the prosecution and asserted that Sheppard conceded his guilt by hiring a prominent criminal lawyer. Sheppard's counsel objected to this broadcast and requested a continuance, but the judge denied the motion. When counsel asked the court to give some protection from such events, the judge replied that "WHK doesn't have much coverage," and that "[a]fter all, we are not trying this case by radio or in newspapers or any other means. We confine ourselves seriously to it in this courtroom and do the very best we can."

3. While the jury was being selected, a two-inch headline asked: "But Who Will Speak for Marilyn?" The front-page story spoke of the "perfect face" of the accused. "Study that face as long as you want. Never will you get from it a hint of what might be the answer . . . ." The two brothers of the accused were described as "Prosperous, poised. His two sisters-in law. Smart, chic, well-groomed. His elderly father. Courtly, reserved. A perfect type for the patriarch of a staunch clan." The author then noted Marilyn Sheppard was "still off stage," and that she was an only child whose mother died when she was very young and whose father had no interest in the case. But the author—through quotes from Detective Chief James McArthur—assured readers that the prosecution's exhibits would speak for

Marilyn. "Her story," McArthur stated, "will come into this courtroom through our witnesses." The article ends:

> "Then you realize how what and who is missing from the perfect setting will be supplied.
>
> "How in the Big Case justice will be done.
>
> "Justice to Sam Sheppard.
>
> "And to Marilyn Sheppard."

4. As has been mentioned, the jury viewed the scene of the murder on the first day of the trial. Hundreds of reporters, cameramen and onlookers were there, and one representative of the news media was permitted to accompany the jury while they inspected the Sheppard home. The time of the jury's visit was revealed so far in advance that one of the newspapers was able to rent a helicopter and fly over the house taking pictures of the jurors on their tour.

5. On November 19, a Cleveland police officer gave testimony that tended to contradict details in the written statement Sheppard made to the Cleveland police. Two days later, in a broadcast heard over Station WHK in Cleveland, Robert Considine likened Sheppard to a perjurer and compared the episode to Alger Hiss' confrontation with Whittaker Chambers. Though defense counsel asked the judge to question the jury to ascertain how many heard the broadcast, the court refused to do so. The judge also overruled the motion for continuance based on the same ground, saying:

> "Well, I don't know, we can't stop people, in any event, listening to it. It is a matter of free speech, and the court can't control everybody. . . . We are not going to harass the jury every morning. . . . It is getting to the point where if we do it every morning, we are suspecting the jury. I have confidence in this jury . . . ."

6. On November 24, a story appeared under an eight-column headline: "Sam Called A 'Jekyll-Hyde' By Marilyn, Cousin To Testify." It related that Marilyn had recently told friends that Sheppard was a "Dr. Jekyll and Mr. Hyde" character. No such testimony was ever produced at the trial. The story went on to announce: "The prosecution has a 'bombshell witness' on tap who will testify to Dr. Sam's display of fiery temper—countering the defense claim that the defendant is a gentle physician with an even disposition." Defense counsel made motions for change of venue, continuance and mistrial, but they were denied. No action was taken by the court.

7. When the trial was in its seventh week, Walter Winchell broadcasted over WXEL television and WJW radio that Carole Beasley, who was under arrest in New York City for robbery, had stated that. as Sheppard's mistress, she had borne him a child. The defense asked that the jury be queried on the broadcast. Two jurors admitted in open court that they had heard it. The judge asked each: "Would that have any effect upon your judgment?" Both replied, "No." This was accepted by the judge as sufficient; he merely asked the jury to "pay no attention whatever to that type of scavenging . . . Let's confine ourselves to this courtroom, if you please." In answer to the motion for mistrial, the judge said:

> "Well, even, so, Mr. Corrigan, how are you ever going to prevent those things, in any event? I don't justify them at all. I think it is outrageous, but in a sense, it is outrageous even if there were no trial here. The trial has nothing to do with it in the Court's mind, as far as its outrage is concerned, but—"

"Mr. CORRIGAN: I don't know what effect it had on the mind of any of these jurors, and I can't find out unless inquiry is made."

"The COURT: How would you ever, in any jury, avoid that kind of a thing?"

8. On December 9, while Sheppard was on the witness stand he testified that he had been mistreated by Cleveland detectives after his arrest. Although he was not at the trial, Captain Kerr of the Homicide Bureau issued a press statement denying Sheppard's allegations which appeared under the headline: "'Bare-faced Liar,' Kerr Says of Sam." Captain Kerr never appeared as a witness at the trial.

9. After the case was submitted to the jury, it was sequestered for its deliberations, which took five days and four night. After the verdict, defense counsel ascertained that the jurors had been allowed to make telephone calls to their homes every day while they were sequestered at the hotel. Although the telephones had been removed from the jurors' rooms, the jurors were permitted to use the phones in the bailiff's rooms. The calls were placed by the jurors themselves; no record was kept of the jurors who made calls, the telephone numbers or the parties called. The bailiffs sat in the room where they could hear only the jurors' end of the conversation. The court had not instructed the bailiffs to prevent such calls. By a subsequent motion, defense counsel urged that this ground alone warranted a new trial, but the motion was overruled and no evidence was taken on the question.

IV.

The principle that justice cannot survive behind walls of silence has long been reflected in the "Anglo-American distrust for secret trials." *In re Oliver*, 333 U. S. 257,

268 (1948). A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for "[w]hat transpires in the court room is public property." *Craig* v. *Harney*, 331 U. S. 367, 374 (1947). The "unqualified prohibitions laid down by the framers were intended to give to liberty of the press . . . the broadest scope that could be countenanced in an orderly society." *Bridges* v. *California*, 314 U. S. 252, 265 (1941). And where there was "no threat or menace to the integrity of the trial," *Craig* v. *Harney*, *supra*, at 377, we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism.

But the Court has also pointed out that "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Bridges* v. *California*, *supra*, at 271. And the Court has insisted that no one be punished for a crime without "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyranical power." *Chambers* v. *Florida*, 309 U. S. 227, 236–237 (1940). "Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." *Pennekamp* v. *Florida*, 328 U. S. 331, 347 (1946). But it must not be allowed to divert the trial from the "very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the

courtroom according to legal procedures." *Cox* v. *Louisiana*, 379 U. S. 559, 583 (1965) (BLACK, J., dissenting). Among these "legal procedures" is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources. Thus, in *Marshall* v. *United States*, 360 U. S. 310 (1959), we set aside a federal conviction where the jurors were exposed "through news accounts" to information that was not admitted at trial. We held that the prejudice from such material "may indeed be greater" than when it is part of the prosecution's evidence "for it is then not tempered by protective procedures." At 313. At the same time, we did not consider dispositive the statement of each juror "that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles." At 312. Likewise, in *Irvin* v. *Dowd*, 366 U. S. 717 (1961), even though each juror indicated that he could render an impartial verdict despite exposure to prejudicial newspaper articles, we set aside the conviction holding:

> "With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion . . . ." At 728.

The undeviating rule of this Court was expressed by Mr. Justice Holmes over half a century ago in *Patterson* v. *Colorado*, 205 U. S. 454, 462 (1907):

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

Moreover, "the burden of showing essential unfairness . . . as a demonstrable reality," *Adams* v. *United*

States ex rel. McCann, 317 U. S. 269, 281 (1942), need not be undertaken when television has exposed the community "repeatedly and in depth to the spectacle of [the accused] personally confessing in detail to the crimes with which he was later to be charged." *Rideau* v. *Louisiana*, 373 U. S. 723, 726 (1963). In *Turner* v. *Louisiana*, 379 U. S. 466 (1965), two key witnesses were deputy sheriffs who doubled as jury shepherds during the trial. The deputies swore that they had not talked to the jurors about the case, but the Court nonetheless held that,

> "even if it could be assumed that the deputies never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this continual association . . . ." At 473.

Only last Term in *Estes* v. *Texas*, 381 U. S. 532 (1965), we set aside a conviction despite the absence of any showing of prejudice. We said there:

> "It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." At 542–543.

And we cited with approval the language of MR. JUSTICE BLACK for the Court in *In re Murchison*, 349 U. S. 133, 136 (1955), that "our system of law has always endeavored to prevent even the probability of unfairness."

V.

It is clear that the totality of circumstances in this case also warrant such an approach. Unlike Estes, Sheppard was not granted a change of venue to a locale away from

where the publicity originated; nor was his jury sequestered. The Estes jury saw none of the television broadcasts from the courtroom. On the contrary, the Sheppard jurors were subjected to newspaper, radio and television coverage of the trial while not taking part in the proceedings. They were allowed to go their separate ways outside of the courtroom, without adequate directions not to read or listen to anything concerning the case. The judge's "admonitions" at the beginning of the trial are representative:

> "I would suggest to you and caution you that you do not read any newspapers during the progress of this trial, that you do not listen to radio comments nor watch or listen to television comments, insofar as this case is concerned. You will feel very much better as the trial proceeds . . . . I am sure that we shall all feel very much better if we do not indulge in any newspaper reading or listening to any comments whatever about the matter while the case is in progress. After it is all over, you can read it all to your heart's content . . . ."

At intervals during the trial, the judge simply repeated his "suggestions" and "requests" that the jury not expose themselves to comment upon the case. Moreover, the jurors were thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers. See *Estes* v. *Texas, supra,* at 545–546. The numerous pictures of the jurors, with their addresses, which appeared in the newspapers before and during the trial itself exposed them to expressions of opinion from both cranks and friends. The fact that anonymous letters had been received by prospective jurors should have made the judge aware that this publicity seriously threatened the jurors' privacy.

The press coverage of the Estes trial was not nearly as massive and pervasive as the attention given by the

Cleveland newspapers and broadcasting stations to Sheppard's prosecution.[8] Sheppard stood indicted for the murder of his wife; the State was demanding the death penalty. For months the virulent publicity about Sheppard and the murder had made the case notorious. Charges and countercharges were aired in the news media besides those for which Sheppard was called to trial. In addition, only three months before trial, Sheppard was examined for more than five hours without counsel during a three-day inquest which ended in a public brawl. The inquest was televised live from a high school gymnasium seating hundreds of people. Furthermore, the trial began two weeks before a hotly contested election at which both Chief Prosecutor Mahon and Judge Blythin were candidates for judgeships.[9]

While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone, the court's later rulings must be considered against the setting in which

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[8] Many more reporters and photographers attended the Sheppard trial. And it attracted several nationally famous commentators as well.

[9] At the commencement of trial, defense counsel made motions for continuance and change of venue. The judge postponed ruling on these motions until he determined whether an impartial jury could be impaneled. *Voir dire* examination showed that with one exception all members selected for jury service had read something about the case in the newspapers. Since, however, all of the jurors stated that they would not be influenced by what they had read or seen, the judge overruled both of the motions. Without regard to whether the judge's actions in this respect reach dimensions that would justify issuance of the habeas writ, it should be noted that a short continuance would have alleviated any problem with regard to the judicial elections. The court in *Delaney* v. *United States*, 199 F. 2d 107, 115 (C. A. 1st Cir. 1952), recognized such a duty under similar circumstances, holding that "if assurance of a fair trial would necessitate that the trial of the case be postponed until after the election, then we think the law required no less than that."

the trial was held. In light of this background, we believe that the arrangements made by the judge with the news media caused Sheppard to be deprived of that "judicial serenity and calm to which [he] was entitled." *Estes* v. *Texas, supra,* at 536. The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. At a temporary table within a few feet of the jury box and counsel table sat some 20 reporters staring at Sheppard and taking notes. The erection of a press table for reporters inside the bar is unprecedented. The bar of the court is reserved for counsel, providing them a safe place in which to keep papers and exhibits, and to confer privately with client and co-counsel. It is designed to protect the witness and the jury from any distractions, intrusions or influences, and to permit bench discussions of the judge's rulings away from the hearing of the public and the jury. Having assigned almost all of the available seats in the courtroom to the news media the judge lost his ability to supervise that environment. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial. And the record reveals constant commotion within the bar. Moreover, the judge gave the throng of newsmen gathered in the corridors of the courthouse absolute free rein. Participants in the trial, including the jury, were forced to run a gantlet of reporters and photographers each time they entered or left the courtroom. The total lack of consideration for the privacy of the jury was demonstrated by the assignment to a broadcasting station of space next to the jury room on the floor above the courtroom, as well as the fact that jurors were allowed to make telephone calls during their five-day deliberation.

VI.

There can be no question about the nature of the publicity which surrounded Sheppard's trial. We agree, as did the Court of Appeals, with the findings in Judge Bell's opinion for the Ohio Supreme Court:

> "Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. . . . In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life." 165 Ohio St., at 294.

Indeed, every court that has considered this case, save the court that tried it, has deplored the manner in which the news media inflamed and prejudiced the public.[10]

Much of the material printed or broadcast during the trial was never heard from the witness stand, such as the charges that Sheppard had purposely impeded the murder investigation and must be guilty since he had

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[10] Typical comments on the trial by the press itself include:

"The question of Dr. Sheppard's guilt or innocence still is before the courts. Those who have examined the trial record carefully are divided as to the propriety of the verdict. But almost everyone who watched the performance of the Cleveland press agrees that a fair hearing for the defendant, in that area, would be a modern miracle." Harrison, "The Press vs. the Courts," The Saturday Review (Oct. 15, 1955).

"At this distance, some 100 miles from Cleveland, it looks to us as though the Sheppard murder case was sensationalized to the point at which the press must ask itself if its freedom, carried to excess, doesn't interfere with the conduct of fair trials." Editorial, The Toledo Blade (Dec. 22, 1954).

hired a prominent criminal lawyer; that Sheppard was a perjurer; that he had sexual relations with numerous women; that his slain wife had characterized him as a "Jekyll-Hyde"; that he was "a bare-faced liar" because of his testimony as to police treatment; and, finally, that a woman convict claimed Sheppard to be the father of her illegitimate child. As the trial progressed, the newspapers summarized and interpreted the evidence, devoting particular attention to the material that incriminated Sheppard, and often drew unwarranted inferences from testimony. At one point, a front-page picture of Mrs. Sheppard's blood-stained pillow was published after being "doctored" to show more clearly an alleged imprint of a surgical instrument.

Nor is there doubt that this deluge of publicity reached at least some of the jury. On the only occasion that the jury was queried, two jurors admitted in open court to hearing the highly inflammatory charge that a prison inmate claimed Sheppard as the father of her illegitimate child. Despite the extent and nature of the publicity to which the jury was exposed during trial, the judge refused defense counsel's other requests that the jury be asked whether they had read or heard specific prejudicial comment about the case, including the incidents we have previously summarized. In these circumstances, we can assume that some of this material reached members of the jury. See *Commonwealth* v. *Crehan*, 345 Mass. 609, 188 N. E. 2d 923 (1963).

VII.

The court's fundamental error is compounded by the holding that it lacked power to control the publicity about the trial. From the very inception of the proceedings the judge announced that neither he nor anyone else could restrict prejudicial news accounts. And he

reiterated this view on numerous occasions. Since he viewed the news media as his target, the judge never considered other means that are often utilized to reduce the appearance of prejudicial material and to protect the jury from outside influence. We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial and so do not consider what sanctions might be available against a recalcitrant press nor the charges of bias now made against the state trial judge.[11]

The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court. As we stressed in *Estes*, the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged.[12] Bearing in mind the massive pretrial publicity, the judge should have adopted stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested. The number of reporters in the courtroom itself could have been limited at the first sign that their presence would disrupt the trial. They certainly should not have been placed inside the bar. Furthermore, the judge should have more closely regulated the conduct of newsmen in the courtroom. For instance, the judge belatedly asked them not to handle and photograph trial exhibits laying on the counsel table during recesses.

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[11] In an unsworn statement, which the parties agreed would have the status of a deposition, made 10 years after Sheppard's conviction and six years after Judge Blythin's death, Dorothy Kilgallen asserted that Judge Blythin had told her: "It's an open and shut case . . . he is guilty as hell." It is thus urged that Sheppard be released on the ground that the judge's bias infected the entire trial. But we need not reach this argument, since the judge's failure to insulate the proceedings from prejudicial publicity and disruptive influences deprived Sheppard of the chance to receive a fair hearing.

[12] The judge's awareness of his power in this respect is manifest from his assignment of seats to the press.

Secondly, the court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony. A typical example was the publication of numerous statements by Susan Hayes, before her appearance in court, regarding her love affair with Sheppard. Although the witnesses were barred from the courtroom during the trial the full *verbatim* testimony was available to them in the press. This completely nullified the judge's imposition of the rule. See *Estes* v. *Texas*, *supra*, at 547.

Thirdly, the court should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. Much of the information thus disclosed was inaccurate, leading to groundless rumors and confusion.[13] That the judge was aware of his responsibility in this respect may be seen from his warning to Steve Sheppard, the accused's brother, who had apparently made public statements in an attempt to discredit testimony for the prosecution. The judge made this statement in the presence of the jury:

> "Now, the court wants to say a word. That he was told—he has not read anything about it at all—but he was informed that Dr. Steve Sheppard, who

[13] The problem here was further complicated by the independent action of the newspapers in reporting "evidence" and gossip which they uncovered. The press not only inferred that Sheppard was guilty because he "stalled" the investigation, hid behind his family, and hired a prominent criminal lawyer, but denounced as "mass jury tampering" his efforts to gather evidence of community prejudice caused by such publications. Sheppard's counterattacks added some fuel but, in these circumstances, cannot preclude him from asserting his right to a fair trial. Putting to one side news stories attributed to police officials, prospective witnesses, the Sheppards, and the lawyers, it is possible that the other publicity "would itself have had a prejudicial effect." Report of the President's Commission on the Assassination of President Kennedy, at 239.

> has been granted the privilege of remaining in the courtroom during the trial, has been trying the case in the newspapers and making rather uncomplimentary comments about the testimony of the witnesses for the State.
>
> "Let it be now understood that if Dr. Steve Sheppard wishes to use the newspapers to try his case while we are trying it here, he will be barred from remaining in the courtroom during the progress of the trial if he is to be a witness in the case.
>
> "The Court appreciates he cannot deny Steve Sheppard the right of free speech, but he can deny him the . . . privilege of being in the courtroom, if he wants to avail himself of that method during the progress of the trial."

Defense counsel immediately brought to the court's attention the tremendous amount of publicity in the Cleveland press that "misrepresented entirely the testimony" in the case. Under such circumstances, the judge should have at least warned the newspapers to check the accuracy of their accounts. And it is obvious that the judge should have further sought to alleviate this problem by imposing control over the statements made to the news media by counsel, witnesses, and especially the Coroner and police officers. The prosecution repeatedly made evidence available to the news media which was never offered in the trial. Much of the "evidence" disseminated in this fashion was clearly inadmissible. The exclusion of such evidence in court is rendered meaningless when a news media makes it available to the public. For example, the publicity about Sheppard's refusal to take a lie detector test came directly from police officers and the Coroner.[14] The story that Sheppard had been called

[14] When two police officers testified at trial that Sheppard refused to take a lie detector test, the judge declined to give a requested instruction that the results of such a test would be inadmissible

a "Jekyll-Hyde" personality by his wife was attributed to a prosecution witness. No such testimony was given. The further report that there was "a 'bombshell witness' on tap" who would testify as to Sheppard's "fiery temper" could only have emanated from the prosecution. Moreover, the newspapers described in detail clues that had been found by the police, but not put into the record.[15]

The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge's failure to take any action. See *Stroble* v. *California*, 343 U. S. 181, 201 (1952) (Frankfurter, J., dissenting). Effective control of these sources—concededly within the court's power—might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity, at least after Sheppard's indictment.

More specifically, the trial court might well have proscribed extra-judicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. See *State* v. *Van Duyne*, 43 N. J. 369, 389, 204 A. 2d 841, 850 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements.

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in any event. He simply told the jury that no person has an obligation "to take any lie detector test."

[15] Such "premature disclosure and weighing of the evidence" may seriously jeopardize a defendant's right to an impartial jury. "[N]either the press nor the public had a right to be contemporaneously informed by the police or prosecuting authorities of the details of the evidence being accumulated against [Sheppard]." Report of the President's Commission, at 239–240.

Being advised of the great public interest in the case, the mass coverage of the press, and the potential prejudicial impact of publicity, the court could also have requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees.[16] In addition, reporters who wrote or broadcasted prejudicial stories, could have been warned as to the impropriety of publishing material not introduced in the proceedings. The judge was put on notice of such events by defense counsel's complaint about the WHK broadcast on the second day of trial. See p. 11, *supra*. In this manner, Sheppard's right to a trial free from outside interference would have been given added protection without corresponding curtailment of the news media. Had the judge, the other officers of the court, and the police placed the interest of justice first, the news media would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom—not pieced together from extra-judicial statements.

From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing

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[16] The Department of Justice, the City of New York, and other governmental agencies have issued such regulations. *E. g.*, 28 CFR § 50.2 (1966). For general information on this topic see periodic publications (*e. g.*, Nos. 71, 124, and 158) by the Freedom of Information Center, School of Journalism, University of Missouri.

that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

Since the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom, we must reverse the denial of the habeas petition. The case is remanded to the District Court with instructions to issue the writ and order that Sheppard be released from custody unless the State puts him to its charges again within a reasonable time.

It is so ordered.

MR. JUSTICE BLACK dissents.